33539-5-II

No. 33262-1-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

IN RE THE PERSONAL RESTRAINT OF ALEXANDER N. RIOFTA,

ALEXANDER N. RIOFTA, Petitioner

BRIEF IN SUPPORT OF PERSONAL RESTRAINT PETITION

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I. INTRODUCTION

Alexander Nam Riofta was convicted of first degree assault with a firearm enhancement based entirely on an identification from the sole seventeen-year-old eyewitness to the crime. No physical evidence linked him to the crime. The police were unable to find a weapon at Mr. Riofta's residence, any fingerprints at the crime scene, or any evidence in the stolen vehicle used in the assault indicating Mr. Riofta committed this crime.

The only item of physical evidence left at the crime scene was a white hat worn by the assailant. To date, Mr. Riofta has been unable to obtain forensic DNA analysis of this hat. Though the hat may contain the assailant's skin or hair cells, Mr. Riofta's trial attorney failed to request DNA testing at trial. Following his conviction, Mr. Riofta pursued DNA analysis, but the prosecutor denied access to the evidence. During these proceedings, attorney Kristi L. Minchau submitted a letter stating that a client had revealed the true assailant's identity to her thereby indicating Mr. Riofta's innocence.

Fundamental fairness, as encompassed by the Due Process Clause, necessitates access to exculpatory evidence. Analysis of the white hat left at the crime scene has the potential to conclusively show that Mr. Riofta is an innocent man in prison.

Additionally, Mr. Riofta was denied his Sixth Amendment right to effective assistance of counsel at trial. Counsel's failure to even consider testing the hat amounts to a complete failure to investigate the only physical evidence that could have implicated another individual in the crime. This omission, particularly when considered in light of other deficiencies by counsel, constitutes ineffective representation.

These violations of Mr. Riofta's Due Process and Sixth Amendment rights necessitate post-conviction relief in these proceedings.

II. ISSUES PRESENTED

1. Whether the due process principle of fundamental fairness, as articulated in *Brady v. Maryland* and its progeny, necessitates access to exculpatory DNA evidence, even when it was available at the time of trial.

2. Whether Mr. Riofta's Sixth Amendment right to present a defense and compulsory process includes a right to post-conviction DNA analysis.

3. Whether Mr. Riofta's ineffective assistance of counsel claim should be reexamined on collateral review in light of new evidence regarding counsel's deficient performance.

4. Whether Mr. Riofta was denied his Sixth Amendment right to effective assistance of counsel where the State's case rested entirely on eyewitness testimony and counsel's deficiencies included a complete

failure to investigate the only physical evidence recovered from the crime scene.

III. STATEMENT OF THE CASE

In the early morning of January 27, 2000, Ratthana Sok, seventeen years old at the time, left for school through the open garage door at his home. 11/28/00 TR: 177. Leaving at approximately 6:40 a.m., Ratthana noticed an unfamiliar Honda parked outside his house with two or three occupants. 11/28/00 TR: 179-81. One of the passengers, wearing a black jacket and a white hat, got out of the car and approached Ratthana, asking him for a cigarette. He told the individual that he was not a smoker, and kept walking towards the gate. 11/28/00 TR: 181-82.

At this time it was still dark out, with only a few street and house lights to illuminate the approaching individual. 11/28/00 TR: 188-89. Still, Ratthana stated that he got a clear look at his face and "recognize[d] him when he came up . . . close" from playing basketball together at a local park four or five years prior, but that he knew him only by the name Alex. 11/28/00 TR: 182, 185-87.

As Ratthana walked towards the gate, the individual pulled a chrome revolver from his pocket, pointing it at Ratthana's face from two or three feet away. Ratthana, in shock, turned and ran towards the house as the individual began firing the gun. After four or five shots, all of

which missed Ratthana, he escaped safely into his house where his mother called the police. 11/28/00 TR: 183-86.

Ratthana further testified that the police found a white hat outside his house on the sidewalk, and that the shooter was wearing a white hat. 11/28/00 TR: 190-92. When giving a description to the responding officers, Ratthana said the shooter was "17 or 18 years old, five-two or five-three, light build with a mustache and shaved head." 11/28/00 TR: 204. When pressed, he admitted that he had not seen the shooter's head on the day of the shooting because he was wearing a hat. 11/28/00 TR: 204. Ratthana also insisted that he told the police officers that "it was Alex," not that "it looked like Alex." 11/28/00 TR: 199. He conceded, however, that whatever he told the first officer was the truth. 11/28/00 TR: 200.

Tacoma Police Department patrol officer Armin Keen was the first officer to respond to the Sok residence on the day of the shooting; he arrived within five minutes of the distress call. 11/28/00 TR: 215. Officer Keen, the first person to interview the victim, testified that Ratthana told him not that the shooter *was* Alex, but that he "looked like Alex." 11/28/00 TR: 220. Keen specifically noted Ratthana's language, that the shooter "looked like Alex," in his initial reports of the incident. 11/28/00 TR: 222-23.

Forensic Specialist Hank Baarslag testified about holes left by the bullets, a spent bullet, and the white hat that he collected into evidence. 11/28/00 TR: 224-232. Baarslag testified to the lack of fingerprint evidence available in this case. 11/28/00 TR: 235-39. There was no other forensic testing on any of the physical evidence collected at the crime scene. Specifically, there was no attempt to find DNA material, such as hair or skin cells, inside the white hat. 11/28/00 RF: 224-239.

In addition to the eyewitness identification testimony of Ratthana Sok, the State relied on a theory of witness intimidation to tie Mr. Riofta to the assault. The State claimed Mr. Riofta assaulted Ratthana Sok to prevent his older brother, Veasna Sok, from testifying in the 1998 Trang Dai murder case. The Trang Dai murders left five people dead, five others injured, and resulted in eight individuals being charged with murder, among them Veasna Sok. 11/28/00 TR: 240. Veasna agreed to testify against his codefendants in May of 1999, receiving a predetermined jail sentence in return. 11/28/00: TR 241.

Detective Davidson responded to the shooting at the Sok residence solely because of the relationship between Ratthana and Veasna Sok. 11/28/00: TR 244. He conducted a second interview of Ratthana, following Detective Keen's, where Ratthana indicated that the person who "shot at him was someone he knew by the name of Alex." 11/28/00: TR

246. Based on this statement, Detective Davidson brought Ratthana to the police station to show him photograph montages in an attempt to identify the shooter. Instead of conducting the montages based on a physical description of the assailant, Detective Davidson composed montages consisting of individuals named "Alex" or "Alexander," regardless of their physical attributes. From this overly suggestive procedure, Ratthana identified Alexander Riofta as his attacker. Detective Davidson arrested Mr. Riofta at his home the following day, January 28. 11/28/00: TR 247-51.

During Mr. Riofta's interview at the police station, he denied any involvement with the shooting at the Sok residence. He said that he had been out drinking with friends after he got off work, and then had walked home and gone to bed where he slept until 11 a.m. the day of the shooting. 11/28/00 TR: 252-53.

Detective Davidson stated that sometime after the assault on Ratthana, Veasna Sok rescinded his agreement to testify in the Trang Dai murder cases. 11/28/00 TR: 241-244. The State used this fact to imply that Mr. Riofta assaulted Ratthana to intimidate Veasna, thereby preventing his testimony in the Trang Dai proceedings. 11/29/00 TR: 365-366.

Jennifer Saldana, Mr. Riofta's mother, testified in support of his alibi. When she returned from work at 3:30 a.m. on January 27, 2000, Mr. Riofta was asleep in his room. Mrs. Saldana stated that she keeps her door open while sleeping so she can hear when someone walks down the hallway, takes a shower, or rings the doorbell. If Mr. Riofta had left in the early morning hours of January 27, she would have heard him. She woke up at 11 a.m. that day, when Mr. Riofta asked her for bus money to get to work. 11/29/00 TR: 298-304.

On November 30, 2000, the jury returned a verdict of guilty with a firearm enhancement. 11/30/00 TR: 395-96. Following this verdict, Mr. Riofta filed a motion to vacate his conviction and order a new trial under CR 7.8, claiming ineffective assistance of counsel based on trial counsel's failure to raise issues of mental competency, failure to obtain an expert psychological report, and failure to call an eyewitness identification expert. 12/14/01 TR: 403-62. A psychological evaluation by Dr. Robert B. Olsen, as well as a statement by Mr. Riofta's previous counsel Linda R. Sullivan, raised substantial questions about Mr. Riofta's ability to assist in his own defense. *See* App. 1 (Olsen Rep.); App. 2 (Sullivan Decl.).

This motion included a declaration and letter from Dr. Geoffrey R. Loftus, an eyewitness identification expert, detailing specific problems that raise concerns about the reliability of the eyewitness identification in

this case. Among these problems are low light levels, weapon focus,[1] and the biased photo montage constructed by the police. *See* App. 3(a) (Letter from Loftus to McCloud of 3 26, 2001.) The trial court ruled that Mr. Riofta was competent at the time of trial, and that trial counsel was not ineffective for either failing to initiate psychological testing or failing to call an eyewitness identification expert. 12/14/01 TR: 456-461. The trial court denied the motion to vacate on December 14, 2001. 12/14/2001 TR: 455-462.

On September 2, 2003 in an unpublished opinion the Court of Appeals of Washington, Division II, denied Mr. Riofta's appeal which was based on five claims: 1) that his trial attorney was improperly dismissed, 2) his right to a speedy trial was violated, 3) the photomontage was impermissibly suggestive, 4) he was incompetent at the time of his trial, and 5) that he received ineffective assistance of counsel. *State v. Riofta*, 118 Wn. App. 1025 (2003), App. 4. The Supreme Court of Washington then denied Mr. Riofta's petition for review on May 4, 2004. *State v. Riofta*, 151 Wn.2d 1019 (2004). A mandate was issued on May 10, 2004. App. 5.

[1] Weapon focus is the phenomenon of concentrating on a weapon instead of the appearance of the person wielding the weapon. *See* App. 3(a) (Letter from Loftus to McCloud of March 26, 2001.)

On May 28, 2002, Mr. Riofta requested post-conviction DNA testing pursuant to RCW 10.73.170. App. 6(a) (Letter from McCloud to Horne of May 5, 2002). The Pierce County Prosecutor's Office denied this post-conviction DNA request on June 26, 2002. App. 6(b) (Letter from Horne to McCloud of June 26, 2002). Relying on the same law, Mr. Riofta appealed this denial to the Attorney General's Office. App. 6(c) (Letter from McCloud to Blonien of July 3, 2002). The appeal was denied on September 19, 2002. App. 6(i) (Letter from Blonien to McCloud and Horne of September 19, 2002). In March 2005, the Washington State legislature amended RCW 10.73.170, broadening access to DNA evidence. As of the time of this petition's writing, Mr. Riofta is pursuing post-conviction DNA analysis under the new statute.

IV. ARGUMENT

A. The principle of fundamental fairness required by the Due Process Clause necessitates access to DNA testing of potentially exculpatory evidence.

The Fifth Amendment to the United States Constitution, as applied to the states through the Fourteenth Amendment, prevents denial of liberty without due process of law. This case presents an issue of first impression to this Court, namely whether the due process clause includes the right of a prisoner to access evidence that could establish his innocence.

1. ***Brady* and its progeny establish that fundamental fairness under the Due Process Clause requires access to exculpatory evidence.**

The United States Supreme Court has long recognized a right to access exculpatory evidence in criminal proceedings. *Brady v. Maryland*, 373 U.S. 83, 87 (1963). The Court developed this principle when they stated "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material . . . to guilt . . . irrespective of the good faith or bad faith of the prosecution." *Brady*, 373 U.S. at 87. The Court relied heavily on the necessity of fundamental fairness in criminal trials to fashion this rule, noting that "our system of the administration of justice suffers when any accused is treated unfairly." *Id. Brady* stands for the proposition that the purpose of due process "is not to displace the adversary system as the primary means by which truth is uncovered, but to ensure that a miscarriage of justice does not occur." *United States v. Bagley*, 473 U.S. 667, 675 (1985). The State's duty to comply with its obligations under *Brady* is an ongoing one, and continues to bind the prosecution even after conviction and sentencing. *Thompson v. Goldsmith*, 979 F.2d 746, 749-50 n.2 (9th Cir. 1992).

Since *Brady*, many courts have relied on the foundational concept of fundamental fairness to define due process. Of particular relevance is

the fact that many state courts have relied on *Brady* in finding a right to post-conviction DNA testing in cases where that technology did not exist at the time of trial. *See, e.g., Dabbs v. Vergari*, 570 N.Y.S.2d 765 (N.Y. Sup. Ct. 1990) (holding that due process under *Brady* requires DNA evidence with high exculpatory potential to be discoverable after conviction). While none of the state decisions are binding on this Court, they illustrate a common view that the fundamental fairness required by the due process clause includes a right to subject existing biological evidence to DNA testing. This serves to ensure that an innocent man is not "languishing in prison while the true offender stalks his next victim." *State v. Thomas*, 586 A.2d 250, 254 (N.J. Super. Ct. App. Div. 1991) (majority quoting J. Baime, dissenting). *See also Sewell v. State*, 592 N.E.2d 705 (Ind. Ct. App. 1992) (holding that issues of fundamental fairness require release of evidence for DNA testing when it has exculpatory potential under *Brady*); *Commonwealth v. Brison*, 618 A.2d 420 (Pa. Super. Ct. 1992) (holding that due process requires testing of DNA material due to its extraordinary accuracy in matching cellular material to individuals).

Fundamental fairness, if it means anything at all, means that a petitioner have access to evidence which has the strong potential to conclusively illustrate his innocence. All of these cases rely on the central

idea behind *Brady* and its progeny, that the very essence of justice requires that defendants receive a fair trial. If petitioners do not have access to post-conviction DNA tests the government denies the only plausible avenue left to prove their innocence while simultaneously ensuring that innocent people will continue to suffer in prison. *See,* Seth F. Dreimer & David Rudovsky, *Double Helix, Double Bind: Factual Innocence and Postconviction DNA Testing*, 151 U. Pa. L. Rev. 547 (2002).

DNA testing is appropriate even where it was not requested at the time of trial. In circumstances similar to the case at bar, a New Jersey court held that the mistakes of trial counsel in failing to request DNA testing prior to trial do not preclude post-conviction DNA testing. *Thomas*, 586 A.2d. 250. *See also Dabbs*, 570 N.Y.S.2d 765 (concluding that the principles of fundamental fairness require post-conviction DNA testing; the state's failure to test a rape kit may implicate a duty to disclose exculpatory evidence under *Brady*); *but see Mebane v. State of Kansas*, 902 P.2d 494 (Kan. Ct. App. 1995) (denying post-conviction DNA analysis because there were multiple perpetrators and State's case against defendant was otherwise strong).

In *Thomas*, the defendant's counsel considered requesting DNA analysis prior to trial, but failed to file a request due to the financial burdens required to test and admit DNA evidence in the early 1990s.

When the defendant asked to test the rape kits for DNA after trial, the trial judge denied access, holding that the defendant "had made a binding strategic decision to forego DNA testing" and was not allowed a "second bite of the apple." *Thomas*, 586 A.2d at 251. The appellate court reversed, thereby granting post-conviction DNA testing even where it was available at the time of trial. The court stated:

> Relief must be afforded from tactical errors which 'cut mortally into the substantive rights of the defendant.' We can conceive of no course of action by counsel as more nearly affecting a defendant's substantive rights than a failure to pursue competent evidence which might conclusively prove his innocence of the crime charged. *And we can conceive of no greater injustice, when that evidence is available, of depriving a convicted defendant of access to it.*

Id. (citing *State v. Harper*, 319 A.2d 771 (N.J. Super. Ct. App. Div. 1974) (emphasis added)).

While briefly mentioning *Brady*, the *Thomas* court relied on the general principles of fundamental fairness and justice in requiring access to potentially exculpatory DNA evidence, *even where it was available at the time of trial*. *Id.* at 254. Although *Thomas* is not binding on this Court, it is persuasive authority on an issue where there are few, if any, state or federal cases on point.

The case for post-conviction DNA testing is even more compelling in Mr. Riofta's case than it was in *Thomas*. Whereas counsel's decision not to request DNA testing in *Thomas* was strategic, Mr. Riofta's trial counsel's failure to seek DNA testing was not. App. 7 (Walker Decl.) Under *Thomas*, even if the failure to test for DNA was strategic, testing should not be precluded because "our jurisprudential system . . . punish[es] criminal defendants for their crimes, not for their attorneys' mistakes." *Thomas*, 586 A.2d at 254. The facts of Mr. Riofta's case are very similar to those in *Thomas*, and the same principles of fundamental fairness that mandated DNA testing in that case require testing of the white hat worn by the assailant here.

2. The overall weakness of the State's case against Mr. Riofta, in conjunction with evidence that an identifiable third party committed the assault, requires DNA testing in the pursuit of justice and fundamental fairness.

Particularly where the State's case is weak, "fundamental justice requires access to evidence like DNA testing that could very well be the only way for the defendant to establish his innocence." *Thomas*, 586 A.2d at 254. Three key factors illustrate both the weakness of the state's case and the necessity for Mr. Riofta to obtain access to the white hat for DNA analysis: first, the notorious fallibility of eyewitness identifications; second, the State's complete lack of physical evidence linking Mr. Riofta

to the crime; and third, the letter from attorney Kristi L. Minchau indicating that an unidentified third party actually committed the crime for which Mr. Riofta is currently incarcerated.

The State's case relies exclusively on a sole eyewitness identification, a notoriously unreliable source of convictions. In fact, the Supreme Court recognized the grave role that misidentifications play in the criminal justice system, noting that mistaken identification "probably accounts for more miscarriages of justice than any other single factor." *United States v. Wade*, 388 U.S. 218, 229 (1967). Statistics bear out this observation, showing that mistaken eyewitness identification is one of the leading causes of conviction of the innocent: misidentification played a major role in two-thirds of the first 138 DNA exonerations in the United States. *See* The Innocence Project, at http://www.innocenceproject.org/causes/mistakenid.php (last visited Mar. 25, 2005).

The strength of the eyewitness identification is particularly suspect in the present case where the victim admittedly focused on the chrome revolver in his face and viewed the suspect in the dark with only the aid of a few street lights. 11/28/00 TR: 201, 188-89. Both of these factors – weapon concentration and poor lighting – are factors which eyewitness

identification experts point to as leading causes for misidentification. *See* App. 3(a) (Letter from Loftus to McCloud of March 26, 2001).

Mr. Riofta's conviction rests upon unreliable eyewitness identification uncorroborated by any physical evidence linking him to the assault. The only pieces of evidence recovered at the crime scene were a spent bullet and the white hat, neither of which contained fingerprints. 11/28/00 TR: 235-39. The stolen vehicle used in the assault also revealed no fingerprints which linked Mr. Riofta to the crime. 11/28/00 TR: 264-70. Not only was the state unable to find any evidence to implicate Mr. Riofta at the crime scene, but a search of his house also failed to produce any direct evidence, such as a gun. 11/28/00 TR: 258-64.

Conversely, independent evidence exists corroborating Mr. Riofta's claim that DNA testing of the white hat could demonstrate his innocence. On July 29, 2002, Kristi L. Minchau, an attorney representing Jimmee Chea in the Trang Dai murder cases, wrote a letter to Senior Assistant Attorney General John Scott Blonien. *See* App. 6(g) (Letter from Minchau to Blonien of July 29, 2002.) Ms. Minchau's letter, sent in support of Mr. Riofta's post-conviction DNA request, stated that her client told her that Mr. Riofta was innocent and that he knew the identification of the real shooter. *Id.* Although Jimmee Chea was unwilling to release the

name of the actual perpetrator,[2] he was willing to tell Ms. Minchau that the assailant is a convicted violent offender in the state of Washington. *Id.* This means that the assailant's DNA profile would be in the state's databank for convicted felons, and thus it would be possible to link the true assailant to the assault.

DNA databases, such as CODIS, have become an indispensable tool for law enforcement, and convicted offenders are required to submit their profiles to it. Through the use of offender databases like CODIS, DNA testing can not only exclude the wrongly convicted, it can also lead to the apprehension of the real perpetrators of crime.[3] Indeed, in a recent study by the Chicago Tribune of 115 post-conviction DNA exonerations, there were 51 cases where new suspects were identified through the use of DNA databases. *See* Maurice Possley & Steve Mills, *Crimes Go Unsolved as DNA Tool Ignored,* Chicago Tribune, October 26, 2003.

Results of DNA analysis conducted on the white hat could be cross-checked against the State's DNA databank in an effort to verify

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[2] *See* App. 8 (Declaration of Derek Johnson and Seth Woolson regarding further investigation into Jimee Chea's claim).

[3] In holding that the government's interest in maintaining a collection of DNA samples from such offenders was "monumental," the Ninth Circuit noted that such a database "can help absolve the innocent just as easily as it can inculpate the guilty. For while it undoubtedly is true that the wrongly-accused can voluntarily submit to DNA testing should the need arise, use of [a DNA database] promptly clears thousands of potential suspects – thereby preventing them from ever being put in that position, and advancing the overwhelming public interest in prosecuting crimes accurately and expeditiously." *United States v. Kincade*, 379 F.3d at 839, n. 38 (9th Cir. 2004) (citation and internal quotation omitted).

Jimmee Chea's statement. The presence of DNA on the hat matching a violent offender contained in Washington's DNA databank would be highly exculpatory in nature when viewed in light of Ms. Minchau's letter. This would indicate the truthfulness of Jimmee Chea's claim that someone other than Mr. Riofta was the actual perpetrator in the assault of Mr. Sok, and that Mr. Riofta is actually innocent.

B. Mr. Riofta's Sixth Amendment right to compulsory process and to present a defense includes the right to post-conviction DNA testing of potentially exculpatory evidence.

The Sixth Amendment of the U.S. Constitution guarantees that in all criminal proceedings the accused has the right to have compulsory process for obtaining witnesses in his favor. *Washington v. Texas*, 388 U.S. 14 (1967). *Washington* stands for the proposition that fundamental to due process is the right to establish a defense to the crime charged. *Id.* This right to present a defense and to compulsory process is not unlimited; the defendant "must comply with established rules of procedure and evidence designed to assure both fairness and reliability." *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973) (*citing*, *inter alia*, *Webb v. Texas*, 409 U.S. 95 (1972)).

By preventing access to DNA analysis of potentially exculpatory evidence, the State is denying Mr. Riofta the opportunity to present a viable defense to the criminal charges brought against him. Mr. Riofta

proclaimed his innocence from the moment of his arrest. Forensic DNA analysis of the white hat left at the crime scene could provide support for Mr. Riofta's claim of innocence by indicating that another individual committed the crime. Furthermore, the absence of Mr. Riofta's DNA material inside the hat would also indicate that he has never worn the hat.

C. Mr. Riofta's ineffective assistance of counsel claim should be reconsidered in light of new evidence regarding counsel's deficient performance.

A court may reexamine an issue in a personal restraint petition that has already been decided on direct appeal when the ends of justice so require. *In Personal Restraint of Gentry*, 137 Wn.2d 378, 388, 972 P.2d 1250 (1999). Moreover, "an ineffective assistance of counsel claim may be brought in a collateral proceeding . . . whether or not the petitioner could have raised the claim on direct appeal." *Massaro v. U.S.*, 538 U.S. 500, 504 (2003). The *Massaro* Court also noted that ineffective assistance claims should not be brought on appeal because the record likely does not contain the full extent of counsel's deficiencies. *Id.*

In this case, although this Court rejected Mr. Riofta's previous ineffective assistance of counsel claims, a court has not determined whether trial counsel's failure to request DNA testing, in combination with other failures, constitutes ineffective assistance of counsel. Even if the issue has been considered on appeal, justice and fundamental fairness

require consideration of the issue under *In Personal Restraint of Gentry*. Further, collateral review is appropriate because additional facts that support Mr. Riofta's claim are not contained in the appellate record.

D. Mr. Riofta was denied his Sixth Amendment right to effective assistance of counsel.

The Sixth Amendment to the United States Constitution guarantees the right to effective counsel. The Supreme Court has established a two-pronged test for ineffective assistance of counsel claims. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). First, "the defendant must show that counsel's representation fell below an objective standard of reasonableness." *Id.* at 688. Second, "the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. Additionally, the prejudicial impact of counsel's acts and omissions should be considered cumulatively.[4]

An evaluation of prejudice must also be considered in light of the strength of the government's case. The *Strickland* Court noted that "a

[4] *See Williams v. Taylor*, 529 U.S. 362, 397 (2000) (state court decision was unreasonable because it failed to evaluate the totality of the available mitigating evidence in assessing prejudice caused by defense counsel's failure to present evidence); *Harris v. Wood*, 64 F.3d 1432 (9th Cir. 1995) (counsel's numerous deficiencies, when considered cumulatively, established prejudice).

verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support." *Id.* at 696; *see also Luna v. Cambra*, 306 F.3d 954, 966-67 (9th Cir. 2002) (concluding that prejudice existed partly because the prosecution's case was relatively weak), *amended on other grounds by* 311 F.3d 928.

Here, Mr. Riofta's trial representation satisfies both elements of *Strickland* and thus constitutes ineffective assistance of counsel. First, counsel's failure to request DNA testing for the hat worn by the shooter – a complete failure to investigate the only piece of physical evidence that could link the actual perpetrator to the crime – falls below "an objective standard of reasonableness" for a defense attorney. This is particularly true in light of counsel's other mistakes. Indeed, a survey of the overall performance of Mr. Riofta's counsel confounds any presumption that he rendered reasonably professional assistance. Second, there is a reasonable probability that Mr. Riofta would not have been convicted but for his counsel's deficient performance. When the totality of these errors is measured against the weakness of the State's case as required by *Strickland*, the most reasonable conclusion is that counsel's deficient performance undermined confidence in the outcome of the trial.

1. Counsel's failure to seek DNA testing of the hat in and of itself constitutes ineffective assistance of counsel.

Essential to effective representation is the duty to investigate and prepare. *Strickland*, 466 U.S at 668. The *Strickland* Court concluded that counsel "has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Id.* At a minimum, counsel must "*conduct a reasonable investigation* enabling him to make informed decisions about how to best represent his client." *Sanders v. Ratelle*, 21 F.3d 1446, 1456 (9th Cir. 1994) (emphasis in original). In other words, a "lawyer who fails adequately to investigate, and to introduce into evidence , [evidence] that demonstrate[s] his client's factual innocence, or that raise[s] sufficient doubt as to that question to undermine confidence in the verdict, renders deficient performance." *Avila v. Galaza*, 297 F.3d 911, 919 (9th Cir. 2002) (quoting *Hart v. Gomez*, 174 F.3d 1067, 1070 (9th Cir. 1999)); *see also Lord v. Wood*, 184 F.3d 1083, 1096 (9th Cir. 1999) (determining that counsel's failure to interview three witnesses who had material evidence as to their client's innocence rendered deficient representation).

Defense counsel have employed forensic DNA testing in pre-trial preparation and investigation since at least 1992. *See* App. 9 (Prothero Decl.) In a case that involves possible mistaken identification, it is

particularly important that defense counsel investigate evidence that could raise a doubt concerning identity. *Id.* Moreover, in the expert opinion of defense attorney Mark Prothero, reasonably competent counsel should examine any item recovered from a "crime scene for potential biological evidence capable of forensic DNA analysis, particularly any surfaces where someone could have left bodily fluids or shed skin." *Id.* The failure to do so constitutes deficient performance. *Id.*

Indeed, forensic DNA evidence has increasingly been employed to dismantle eyewitness identification. For example, Kirk Bloodsworth was convicted with the rape and murder of a nine-year-old girl based on identification by *five* eyewitnesses, and sentenced to die in Maryland's gas chamber. *Bloodsworth v. State*, 512 A.2d 1056, 1057-58 (Md. 1986).[5] After serving more than nine years in prison, Mr. Bloodsworth was exonerated after DNA analysis of physical evidence from the crime indicated conclusively that he was not the assailant. *See generally* Tim Junkin, *Bloodsworth: The True Story of the First Death Row Inmate Exonerated by DNA* (Algonquin Books of Chapel Hill 2004). If five individuals were in fact wrong in their identification of Mr. Bloodsworth, the single eyewitness in this crime may also be mistaken.

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[5] After the *Bloodsworth* Court granted a new trial because the State withheld potentially exculpatory evidence, Mr. Bloodsworth was again convicted. This decision was affirmed by *Bloodsworth v. State*, 543 A.2d 382 (Md. 1988).

While the power of exculpatory DNA evidence is well known throughout the legal community, Washington courts have not addressed whether counsel's failure to obtain DNA testing constitutes ineffective assistance of counsel. However, in *State v. Hicks* a Wisconsin court of appeals reversed the conviction of Anthony Hicks on ineffective assistance of counsel grounds because his attorney decided to forego pretrial DNA testing of evidence. 536 N.W.2d 487, 491-92 (Wis. Ct. App. 1995) (*Hicks I*). The State performed scientific testing of blood, semen and saliva, but the results proved inconclusive. *Id.* at 489. The State introduced into evidence hairs from an individual that, according to a State crime analyst, were consistent with samples provided by Mr. Hicks. *Id.* The only other evidence used to convict him was identification by the sole eyewitness to the crime – the victim. *Id.* at 492. He was sentenced to nineteen years for robbery, burglary and sexual assault. *Id.*

Mr. Hicks subsequently obtained DNA testing of the hairs introduced by the State during trial, the results of which indicated that he was not the assailant. *Id.* at 490. Mr. Hicks filed a motion for a new trial on the grounds of ineffective assistance of counsel. *Id.* After the trial court denied this motion, the Wisconsin Court of Appeals reversed, concluding "that there is a probability sufficient to undermine confidence in the outcome that, but for counsel's failure to subject the hair specimens

to DNA analysis, the result of the trial would have been different." *Id.* at 492.

On appeal, the Wisconsin Supreme Court affirmed on the grounds that, since the primary issue was identification, Mr. Hicks was entitled to "a new trial in the interests of justice." *State v. Hicks*, 549 N.W.2d 435, 439 (Wis. 1996) (*Hicks II*). The State then dropped all charges against Mr. Hicks. *Hicks v. Nunnery*, 643 N.W.2d 809, 814 (Wis. Ct. App. 2002) (*Hicks III*). After spending more than four years in prison, he was exonerated based on forensic DNA evidence.

Mr. Hicks subsequently prevailed in a civil suit against his attorney for negligent representation in *Hicks III*. 643 N.W.2d at 812. The *Hicks III* Court concluded that the attorney's failure to obtain DNA testing of a hair was a substantial factor in producing a guilty verdict against Mr. Hicks. *Id.* at 828. Furthermore, the court rejected the attorney's claim that, since DNA testing would not positively exclude his client, his failure to obtain such testing did not cause the guilty verdict. *Id.* at 827.

The facts of Mr. Riofta's case are similar to those in the *Hicks* cases. The State's case was based exclusively on identification from the only eyewitness to the crime. However, Mr. Riofta's case is different in two respects. First, hair recovered after the crime in *Hicks* was at least consistent with samples provided by Mr. Hicks. Here, no physical

evidence of any kind links Mr. Riofta to the crime. Second, whereas counsel in *Hicks* decided as a strategic matter against pre-trial DNA testing of the hair, counsel in this case did not even consider forensic analysis of the hat despite the potential fallibility of such eyewitness identification. Instead, it simply did not occur to him that forensic DNA evidence lifted from the hat could link another individual to the crime. App. 7 (Walker Decl.) Surely, if an ineffective assistance of counsel claim was successful in a case where physical evidence was actually consistent with the defendant's own samples and counsel consciously decided against testing, the same claim should succeed here given the complete lack of physical evidence that links Mr. Riofta to the crime and counsel's failure to even consider testing the hat.

Counsel's complete failure to investigate the only physical evidence recovered from the scene that could potentially implicate another individual falls below an "objective standard of reasonableness" under *Strickland*. Reasonably competent counsel would have requested DNA testing on the hat given the facts of this case. App. 9 (Prothero Decl.) By failing to even consider such physical evidence, counsel failed to subject the State's case – as weak as it was – to reliable adversarial testing as envisioned by the *Strickland* Court. Forensic test results may well have raised significant doubt concerning the sole eyewitness testimony.

Further, but for Mr. Riofta's counsel's failure to seek DNA testing of the hat, there is a reasonable probability that Mr. Riofta would not have been convicted. Again, the State's case rested entirely on the victim's testimony. Any biological evidence that linked someone other than Mr. Riofta to the shooting would cast serious doubt on – if not negate – this testimony. Mr. Riofta's representation thus constitutes ineffective assistance of counsel under *Strickland*.

2. The cumulative effect of counsel's omissions further demonstrate that Mr. Riofta was denied his Sixth Amendment right to effective assistance of counsel.

Counsel's ineffective representation becomes even more egregious when his omissions are considered cumulatively. He failed to raise Mr. Riofta's competency to the trial court, despite an expert psychiatric report and other declarations that indicate significant doubts about Mr. Riofta's competence and ability to communicate effectively with counsel at the time of trial. *See* App. 1 (Olsen Rep.), App. 2 (Sullivan Decl.)

Counsel failed to obtain an expert psychological evaluation of Mr. Riofta, even though he suffers from a long-standing psychotic paranoid disorder among other conditions. *See* App. 1 (Olsen Rep.). Without this diagnosis, counsel was unable to explain Mr. Riofta's seemingly unsympathetic and evasive emotional tirade toward officers when they first questioned him about the shooting. In fact, Mr. Riofta's

psychological conditions manifest in an inability to communicate in any manner other than streams of profanities. *Id.* Regardless, counsel completely failed to investigate any psychological explanation for his client's seemingly strange response to the officers.

Counsel failed to interview an expert eyewitness identification witness, which prevented him from properly investigating the inaccuracies and problems with the lone eyewitness identification. Counsel did not even consider using an eyewitness expert at trial. 12/12/01 TR: 412-13, 427. Further, at the time, counsel had never consulted such an expert in any case. 12/12/01 TR: 427-28. Indeed, counsel did very little other than suggest that the victim's statement to officers immediately following the crime that the shooter "*looked like* Alex" should not be interpreted to mean that it "*was* Alex." 11/28/00 TR: 199-201. Failing to obtain basic background information regarding eyewitness identification is particularly problematic when, as here, the State's case rests entirely on identification from a single eyewitness to the crime.

3. The prejudicial impact of the deficient representation must be viewed in light of the weakness of the State's case.

Again, the record provides scant support for Mr. Riofta's conviction. Mr. Riofta's conviction was based exclusively on notoriously unreliable eyewitness identification. No physical evidence was introduced

that linked Mr. Riofta to the crime. The only evidence recovered at the crime scene was a spent bullet and a white hat that was worn by the shooter, neither of which contained fingerprints. Similarly, the stolen vehicle used in the assault revealed nothing that linked Mr. Riofta to the crime, and a search of Mr. Riofta's house likewise produced no evidence. *See* discussion *infra* Part IV.A.2. When counsel's errors and omissions are measured against the weakness of the State's case, as *Strickland* requires, the most reasonable conclusion is that Mr. Riofta was denied his Sixth Amendment right to effective counsel.

V. CONCLUSION

Mr. Riofta has maintained his innocence from the beginning of this case. He was convicted based entirely on the identification of a single, seventeen-year-old eyewitness to the crime. Absolutely no physical evidence links Mr. Riofta to the crime. Fundamental fairness and justice under the Due Process Clause necessitate DNA testing of the hat in this case. Further, counsel's failure to seek DNA testing of the only available piece of physical evidence that could have demonstrated his client's innocence constitutes ineffective assistance of counsel in and of itself. Counsel's representation becomes only more egregious when the totality of his deficiencies is also considered.

For the above stated reasons, Petitioner respectfully requests that his personal restraint petition be granted, or in the alternative that he be granted an evidentiary hearing.

Dated this 22nd day of April, 2005.

Respectfully Submitted,

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No._____

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

IN RE THE PERSONAL RESTRAINT OF ALEXANDER N. RIOFTA,

ALEXANDER N. RIOFTA, Petitioner

APPENDICES IN SUPPORT OF PERSONAL RESTRAINT PETITION

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FORENSIC CONSULTATION

PATIENT'S NAME: Alex Nam Riofta

DATES OF EVALUATION: April 7 and 14, 2001

SOURCE OF REFERRAL: Consultation is requested by Mr. Riofta's attorney, Ms. Sheryl G. McCloud.

SOURCES OF INFORMATION:

1. Clinical interview with Mr. Riofta for three hours on April 7 and four hours on April 14, 2001
2. Biographical timeline of schools, education, placements and treatments supplied by Ms. McCloud
3. Summary letter from Anela Patterson, MA, Administrative Coordinator for Hale 'Opio Kaua'i, Inc., dated March 7, 2001
4. Quarterly progress reports of Hale 'Opio Kaua'i, Inc., Therapeutic Foster Home Program, dated April 28, 1995, July 24, 1995 and October 23, 1995
5. Discharge Summary from Hale 'Opio Kaua'i, Inc., Therapeutic Foster Home Program, dated January 29, 1996
6. Testing materials administered:
   a. Conners' Adult ADHD Rating Scale - Self-Report: Long Version (CAARS-S:L), April 7, 2001
   b. Millon Clinical Multi-Axial Inventory (MCMI-III), April 7, 2001
   c. Beck Depression Inventory, April 7, 2001
   d. Zung Depression Rating Scale, April 7, 2001
   e. North American Adult Reading Test, April 14, 2001
   f. Drawing Test, April 14, 2001
   g. Clock Test, April 14, 2001
   h. Trails A and Trails B, April 14, 2001
   i. Five Point Test, April 14, 2001
   j. Controlled Oral Word Association Test, April 14, 2001
7. 30-minute telephone interview with Jennifer Saldana, April 17, 2001

REASON FOR CONSULTATION: Consultation is requested for psychiatric evaluation with attention to peculiarities of speech and mood and emotional regulation.

PROBLEM: Is there a neurological and/or a psychiatric disorder, which could account for Mr.

Riofta's current and recent behavior?

CONFIDENTIALITY: Mr. Riofta understands that this evaluation is requested by the court through his attorney. He understands that a report will be generated following completion of the consultation and will be forwarded to his attorney. He understands that he is not obligated in any way to answer any particular questions put to him during this evaluation and that queries put to him but not answered will be noted in the record.

CHIEF COMPLAINT: "To tell you my unguiltyness."

BACKGROUND: "My mother worried about me." With prompting and cueing, Mr. Riofta gave a history that he was born in Georgia. He has an older sister and multiple step-siblings. "My dad had problems." His parents separated when he was eight years old. He recalls spending time at his grandmother's from ages 8 to 13, returning to his father between age 13 and 14. "He sent me to Hawaii. I really couldn't cope." In Hawaii, he stayed with a paternal aunt and uncle and was back and forth to a group home. He was then sent to a second island to stay with his grandmother.

Alex was the second of two children born into an intact, but chaotic family. He was delivered by Cesarean section though his mother is unsure why Cesarean section was chosen. Alex himself reports that he "started coming out feet first." His mother denies any complications during the pregnancy; specifically, she denies serious illness, medication use, alcohol or recreational drugs. She had minimal weight gain during pregnancy. She adds later in the interview that she was victim of frequent serious violent domestic abuse from her husband, Larry, who would frequently strike her, often striking and kicking her in the stomach severely throughout her pregnancy with Alex. "Maybe that's why he's so angry."

At about 18 months, Alex was sent to Hawaii to stay with his paternal grandmother while his mother, father and older sister went to Germany where his father was to be stationed. Upon being reunited with his family at age 2½, his mother noticed immediately that he was "a difficult child....angry, hard to handle." The grandmother told her that Alex was "one child difficult as 10 children." Alex was described as very headstrong as a toddler, that he would not do what he was told. Corporal punishment began at age 3, particularly spanking with an open hand, usually for misbehavior or displays of anger. She acknowledged that father Larry would spank him as well, but she willingly offered little detail.

In preschool, Alex was "not like the other kids." He would sit in the corner, wouldn't listen to the teacher, wouldn't listen to his peers. His activities were more solitary. He would "play with toys all the time, not much play with others, more alone, lonely." She remembers some of his favorite toys being "the Hulk, a wrestler." She remembers him having daily nose bleeds during early and mid childhood. She recalls that Alex would have children over to the house or go to other people's houses, but throughout his childhood "his friends would slowly disappear, that he seemed to have some 'communication' problem."

Alex' mother believes that he is not academically inclined. He had great difficulties in school,

particularly significant difficulties learning to read and only slightly less severe problems with spelling and mathematics. To this day, she believes he has difficulty studying. He was unable to complete a course at the local vocational technical school. He does not have a driver's license because he cannot study for the test.

When asked to describe his early childhood, Mr. Riofta reported that he would "stay a lot with my grandparents." With cueing, he reports that his paternal grandfather was in the military in the Philippines, that his father joined the military and the family moved to Hawaii and that he lived in Washington off and on.

Alex' early memories are "I used to be an angry person. I dissociated from inside and outside people. I kept to myself. I was never involved with people."

Alex recalls having problems in school. He had difficulties in preschool and first grade. He remembers getting in trouble for pulling a girl's hair and for a fight. "Some guy came on to me." He remembers getting lost after telling his parents he was going away and never coming back. He recalls failing first grade. "The teacher, she was really angry....it feel like a hit" and motioning that the teacher, Ms. Partlow, grabbed him. His response was "bust your ass to do right...my parents not grab me like that." He recalls having similar problems in fourth and fifth grade. He remembers two teachers - Ms. Carbonte and Ms. Jardin. "I wish is would have stabbed them." He explains that he did not want to eat his lunch and they force-fed him his lunch. "I never told my parents what they did cuz I thought they didn't care."

Alex believes that he was good at school work. He describes getting A's and B's in special education classes. When asked about distractibility, he responds, "I see people do things, I start doing it too. I thought it was funny. I started not going to school for my reasons. Some teacher pissed me off, so I skip class and get high."

Educationally, things did not get better for Alex. He recalls going to a number of schools in Hawaii and has difficulty keeping them straight. He attended school in Germany, where his primary occupation was getting out of school. Alex continued to have difficulties in middle school. When asked what kind of difficulties, he responds, "I got jumped by some punks. I saw the five guys. I got myself all cleaned up. I whupped the guy's ass and he got suspended." He recalls some of his tenure at Lincoln High School in Tacoma quite favorably. He remembers the principal, Bob Hunt, fondly; however, he was also expelled from Lincoln High School. He explains the situation: "Some guy messing with me. He tall, pulled a steak knife. This fool pulled a knife on my homeboy, say I stole his shit,(but) I don't steal no more."

Alex recalls only one pet, a dog, Torpedo. Alex was attending first grade in Olympia at the time. He describes Torpedo as "teeth like a devil...get into fights...couldn't control him...dad told me he went to dog pound, I don't think so. Asian people eat them...my mom hates any animal. My grandmother hates lizards...she lives in Hawaii." Alex' response to losing his dog was "it didn't mean anything to me...lost a little...wish I still had him,...like Marmaduke, only vicious."

Alex describes not only problems with peer relationships during childhood, but also during solitary play. One of Alex' pursuits during childhood was playing with Lego's. However, while he enjoyed it at times, he also recalls "fucking up on the decals and shit. I did it all by myself. I didn't put it altogether because the parts were broken. Everything got broken. I grew out of my toy world at 10 or 11. I fuckin' hate living in Hawaii, like living in Olympia, in trouble all the time. An angry person. Like my dad's visit. He would lie about seeing me."

HISTORY OF CURRENT EVENTS:

PAST LEGAL HISTORY:

1995: 30 days spent at Hawaii Youth Corrections Facility for assault.
1999: Age 22, incarcerated for domestic violence after "the police pressured (girlfriend) to testify against me. Her boyfriend jumped me. I didn't press charges."

PAST PSYCHIATRIC HISTORY

Inpatient: Alex reports seeing a counselor, Paula, of the Children's Mental Health Team in middle school. In high school, age 15, he was hospitalized for two weeks at Castle Medical Center of Oahu. He was taken to the hospital by the police. "Counselor put me there. She said to protect me for a few weeks. She fucked me up...Didn't like staff there, way they talked to me, grabbed me."

Outpatient: "Yeah."

Suicide History: None.

Substance Abuse: No active treatment.

Psychotropic Medication: Currently, Alex is prescribed Quetiapine (Seroquel) 400mg daily which he takes sometimes, sells sometimes and snorts sometimes. During the interview he reports both taking and not taking the Seroquel during his trial. He wanted to be awake and alert. The Seroquel taken intra-nasally affects him like marijuana. He recognizes no other psychotropic medications other than Prozac, which he reports had no effect.

PAST MEDICAL HISTORY

Illnesses: Allergies, asthma, recurrent otitis media. He believes that he had frequent high fevers. "One time I was real sick and people banged on the door. That fever got off, I sweat a lot." Alex denies brain infections or diseases, cerebral palsy and encephalitis, epilepsy or seizures. He is unfamiliar with terms such as rheumatic fever or scarlet fever. He denies venereal disease, "I took all the

tests."

Surgeries: None.

Transfusions: None.

Hospitalizations: See Past Psychiatric History.

Injuries: Pedestrian versus auto accident, struck on the left side, taken to the hospital and released. Had gradual complete recovery. Recurrent head injury: Significant fall at age 5. Duration of unconsciousness unknown. History of head injury in third or fourth grade. Knocked out while in a juvenile home. "Hit me like a video game." Alex came to in the hospital. "I didn't know why I was there. They told me I was knocked out."

Allergies: Multiple environmental allergens.

Toxic Exposures: None.

Foreign Travel: Germany in early adolescence.

Habits: Alcohol: initial sampling of alcohol began at age 8, drinking regularly by age 13. Currently, when out of the facilities, he will drink beer three to five days a week, usually about 24 ounces. He denies being able to drink more than most people his age or size because he throws up. He does not think he gets into trouble with alcohol or have blackouts. He does report blackouts associated with rage. Drug use: Alex denies use of all drugs other than marijuana. He tried Valium once. He tried snorting Seroquel. He denies he the use of amphetamines, barbiturates, cocaine or crack, hallucinogens, inhalants, opiates, PCP or DMT.

Current Medications: "BS Seroquel, bud high pills. It's a government plan or something. I get fucked up. Messes with bathroom stuff. I sleep a lot. I feel like pissing, but I don't wake up, so I take a very large urination." As noted, Alex may or may not take his medication.

EDUCATIONAL HISTORY: Alex did not complete high school. He did attend Clover Park Technical College and reports obtaining a certificate/diploma in 1997. His mother reports that he dropped out. See also Background History for related educational concerns.

OCCUPATIONAL HISTORY: Alex has held a number of short-term jobs, including working in fast food restaurants as well as telemarketing, general labor and most recently in newspaper circulation. "I couldn't keep a job...my attitude. People don't hire me because they check my record."

PAST PERSONAL HISTORY: See Background.

NEUROPSYCHIATRIC REVIEW OF SYMPTOMS:

Problem Solving:

Difficulty Planning Ahead: "My problems in the future (have to) start being selective. Not real good with statements. You don't know what the hell."
Difficulty with Sequencing: See above comments regards Lego's.

Speech, Language and Math Skills:

Dysnomia: "I make up my own words," particularly if he does not have the requisite vocabulary.

Difficulty Understanding What Others Are Saying: "I get confused about what people say…I hear things." "I take it in the wrong meaning, like getting mad…"

Difficulty Communicating with Others or Having Others Misunderstand You: "Friends tell me that I want to tell them everything, so I get a lot of stuff into it."

Difficulty Staying With One Idea: See above content.
Difficulty with Mathematics: "Sorting stuff in the kitchen, you gotta put it in groups of five. I forget one or two….I'm not a petty, penny person. I'm not worried about (small change). Not worried about petty shit like that, just an estimate and shit kind of person."

Non-Verbal Skills:

Problems Drawing or Copying: "A person pisses me off so I put his picture on the front of the TV. That pisses you off."
Decline in Musical Abilities: "Before I could….answering questions. I know it's not a straight answer cuz I tried to think."

Concentration and Awareness:

Highly distractible. Looses Train of Thought Easily: "Once in a great while."
Mind Goes Blank: "Sometimes my mind is not even on."

Sensory Symptoms:

Olfactory: "Sloppy Joe smells like somebody sock and vinegar. I smell it now. It's too vinegarized."
Auditory: "I hear things. I know exactly what they're going to stay (because of) experience with other people. They're thinking bad about me. They're talking bad about me, talking shit about me. Why he looking at me like he want to kill me…."

"People say I'm trying to say I'm crazy….People talk shit and knock me for what they do.

Better for someone to talk to my face, not behind my back...back stab me, take money and not pay me back. Just 'fuck you,' just 'dick you' straight up disrespect." Comments of other talking about him in derogatory or insulting fashion occurred frequently as did his attention to non-verbal communication from others.

Visual: Will see stars or flashes of light if he overexerts. Describes floaters in the morning when he opens his eyes.

MENTAL STATUS EXAMINATION:

General Appearance: Alex presents as a diminutive young-appearing Asian male with mild facial acne, a sparse mustache and very closely cut hair. His clothing is appropriately assembled. Eye contact is limited alternating with periods of intense focus on the examiner briefly during intensive verbal production. There are several instances in which Alex watched the examiner intently out of the corner of his eye, usually looking to his own right. Facial expressions were congruent with context, and he showed reasonably mobile facial expressiveness. His general appearance and demeanor suggested a tense wary edginess. On the second interview, Mr. Riofta had a swollen, bruised and slightly lacerated lower lip and a left medial ocular subconjunctival or scleral hemorrhage which did not extend into the limbus.

Motor Behavior: Alex' gait was lumbering as though he were much larger than he was. He did not shake hands at the beginning or end of either interview. He sat during most of the interviews, but shifted position frequently. He appeared restless. He fidgeted with his hands frequently. There was a recurrent mild circular tremor of the left forearm which he held fairly close to his body using the right arm crossed over. He was noted to have eight mild generalized myoclonic twitches in 15 minutes. He also had myoclonic twitching or possibly tics during a 15-minute observation. It is possible that these occurred more frequently, but were missed by the examiner. There were no overt repetitive tics noticed during the interview. During periods of intense emotional display, for example, describing the circumstances that led to, preceded and occurred during his arrest, Mr. Riofta acted out a number of behaviors using his upper body.

Speech: Speech rate is usually accelerated. Prosody is reasonably normal, volume is normal to loud, again depending on the level of affective arousal. Speech articulation is often difficult, mumbled, occasionally mildly dysarthric, and heavily laden with corporalalic and scatological terms as well as ghetto patois.

Emotions:

Mood: The general mood during the examination was one of overt anger, defiance and suspiciousness.

Affect: Affect was congruent with mood content and body posture. There were sustained periods of watchful vigilance and an underlying tone of plaintive desperation.

Perceptions: Mr. Riofta describes repeated auditory hallucinations of people speaking badly about him. He describes occasional olfactory hallucinations. He occasionally has dreams that will tell the future. He repeatedly describes ideas of reference.
Example: When asked about his hearing and hearing what others say, he responded "I don't listen. I only listen to what I want. I heard the same thing over and over....I get misconfused about what people say. I hear things. I knew exactly what they're going to say. Experience with other people. They're thinking bad about me. They're talking bad about me. Talking shit about me. Why he lookin' at me like he want to kill me....They talk shit and knock me for what *they* do. Better for someone to talk to my face, not behind my back....People say, people act, people snitch on other people. I know people talk shit about me, steal things. Most snitch county I ever been to so I keep to myself...."

Alex describes repeated auditory hallucinations.
Example: "One day there's a maintenance check so I walked through the door because I have to go to his room, I have to talk to him and I told him, 'Hey man, why you talking shit behind my back and telling everybody you going roll my eyes and all this.' He said 'No I'm not even tripping.' I said, 'Well, I'm talking about it.' "

Example: "I heard it through the window or something like that because I heard you telling everybody you're going to blow my ass or some shit like that. I told him fuck off. He says, 'Oh, who'd you hear from?' I said, 'just from those people out here.' Told him, 'I never said nothing to guards. It's not like I'm scared of you.'"

Alex describes auditory hallucinations and persecutory illation together.
Example: "Yeah, we had that little conversation on our block...about that I mean. Not all the time, like, when someone looks at me that's how I can tell you know two people talking about me. They don't say I can't hear you know. I know they're talking. Sometimes if they don't even point, they just look this way, I know; I'm not stupid, you

know cuz that's this guy I confronted about the other day, this guy told me the other day said that I told him that, that uh the other kid that was talking about him said that if he took the other guy's shit, how do I know if it wasn't him, and he got mad and went to that person for that, and that person got mad so I told him his name. I said, Mel, I wasn't trying to snitch on. If anything else, I was trying to defend you cuz I was trying to tell him that you didn't say that, that you did say that he stole it, but you did say that. How do you know if he stole from that guy or even steal from me? And then, they came out to be all full of shit because they both pinned it on their moms and said that they didn't do it. Social worker told me that they did one of the ones that took my shit, so.....that's how I feel about the world most of the time when shit like that happens. There's not true to everybody is, you know, but the majority....that's how I feel like everyone's against me and shit because people do fake shit like that.

Alex describes grandiosity without insight.
Example: "Yeah. Like I wanted to be a model and this crap. I want to be an artist, a musician, (unintelligible) I wanted to work with so many different people, I wanted to travel but not enough jobs ever came."

Alex also describes feelings of jealousy. Part of the stimulus for his domestic violence event was he acknowledges that he sometimes felt jealous of Lindsay, his former girlfriend. "She probably was a 'ho, sometimes tripping, some guy drop her off and pick her up."

Thought Processes:

Thought processes are primarily tangential with rapid digression from the subject under discussion. Occasional thought blocking was noted as was some circumstantially, the latter particularly during his description of the day of his arrest.
Example: When asked about his perception of the world in general, he responded, "World seems more crazy. No people trust unless (blocking). Most people full of shit. Skeptical of people, especially attorneys. Tells me what kind of world it is."
Example: When asked about thoughts that come to mind repeatedly to bother him or distract him, he responds, "I get stuck on something else like in la-la land or something else. How much time they going to give me? What will I do when I get out? Not so negative on the outside. Money...I'm like the happy gambler. I get serious about money."
Example: When inquiring about obsessions, for example, dirt or germs, Mr. Riofta replies, "I know he's going to spit and get it in my mouth. I say 'Why the hell you keep following me?'" He stands, pulls

	away, covers his mouth with his hand and eyes shift to right lateral gaze.
Theme of the Interview:	The theme of Mr. Riofta's conversation is that of a malevolent world to which he must respond in a defiant, assertive, aggressive fashion.
Cognitive Function:	Based on interview, it is estimated that Mr. Riofta has a low normal intelligence as well as significant intellectual impoverishment and cultural deprivation. Orientation and memory appear intact.
Abstraction:	Mr. Riofta is able to do some abstraction. Example: When asked about working with attorneys, he responds, "Come into room, it's the same shit. Never had to go through so much shit to save my own fucking life for something I didn't do. Have to open two toilet papers (rolls) to get a piece of toilet paper."
Impulse Control:	Given Mr. Riofta's world-view, ideas of reference, social isolation and lack of ego boundaries, it would suggest that impulse control, particularly for hostile, angry verbalization would be quite low.
Insight:	Mr. Riofta has limited insight into the unreality of his own thought processing, the impact of his behavior on others.
Judgement:	Mr. Riofta's judgement in his daily affairs in compromised by his impaired thinking and emotional regulation.
Lethality:	
Suicide:	None
Homicide:	None elicited
Self Injury:	None
Placing Self in Danger:	High probability owing to his paranoid perceptions and willingness to respond defiantly to them.

Insight and/or Acceptance of Illness: Absent.

Judgment:	Intact for activities of daily living.

MEDICAL RECORD REVIEW: Pending

PSYCHOLOGICAL TESTING

Cognitive Function:

Trails A: 68 seconds, impaired range

Trails B: Error in administration, unscorable

Controlled Oral Word Association (COWA):

FAS Results: 12/12/12; total score 36, 33rd %ile

Category (Animal): Total 20, 50th %ile

North American Adult Reading Test (NAART): 37 errors, estimated full scale IQ approximately 90.3 +-8.8

Attention Deficit Disorder/Hyperactivity Disorder:

Conners' Adult ADHD Rating Scale - Self-report: Long Version (CAARS-S:L): None of the category scores exceed T-score of 65.

Historical Review of Utah Criteria: Does not meet either narrow Utah criteria or broad criteria, but does meet criteria in inattention and impulsivity subsections.

Personality Mood and Clinical Disorder Testing:

Beck Depression Inventory (BDI): Total 21 indicating moderate to severe depression.

Zung Depression Rating Scale: Incomplete, unscoreable.

Zung Anxiety Rating Scale: Incomplete, unscoreable.

Millon Clinical Multi-Axial Inventory (MCMI-III):

Response tendencies: The response tendencies may convey feelings of extreme vulnerability or a characterologic inclination to complain or be self-pitying.

Clinical Syndromes: Tests indicate that Alex may well be experiencing the clinical symptoms of a delusional (paranoid) disorder. This is a psychotic disorder; that is, ideas, beliefs, interpretations of the external world and others' behavior is not in touch with reality. This disorder is probably set within a broad context of other problematic characteristics and personality pathologies

Personality Patterns: A significant pathology characterizes Alex' overall personality organization. Periods of marked emotional cognitive or behavioral dysfunction occur under stress. This particular profile suggests highly variable and unpredictable moods, resentful irritability, untrusting, pessimistic outlook and feelings of being cheated and misunderstood. He is likely to anticipate being disillusioned by others and often behaves obstructively. He is deeply untrusting and suspiciously alert to efforts that threaten his self-determination and autonomy.

DISCUSSION::

Delusional disorder (DD) is a psychotic disorder characterized by firm and unshakeable belief(s) that others would regard as unrealistic. Commonly, the delusions are "encapsulated", that is that they focus on a circumscribed unified group of ideas and/or individuals while the suffer functions normally in other areas of life. In the clinical case, the onset of delusions occurs during adulthood, but DD has been reported to occur in adolescents.

In this case, the diagnosis of DD is based upon presence of persecutory ideation, non-bizarre hallucinations and ideas of reference ("Why he looking at me that way?") The differential diagnosis must include Schizophrenia. Mr. Riofta's illogic, impaired communication, isolation and interpersonal, social, academic and vocational failures would raise the specter of Schizophrenia. However, the term Schizophrenia was derived to focus on the breakdown between components of personality, i.e. disconnection between stated mood, emotional expression, and thoughts as demonstrated by speech production and behavior. An example could be laughter while talking about death of a loved one. Furthermore, Schizophrenia in current parlance requires the presence of bizarre delusions that are recognized by most people as out of touch with reality. An example would be being the victim of a machine that sucks thoughts out of your head and/or controls you robotically.

Historically Mr. Riofta has had behavior problems and communication impairment since age two and a half years. This age of onset is most congruent with a Pervasive Developmental Disorder (PDD). The most severe forms of PDD are Childhood Autism and Childhood Disintegrative Disorder. PDD represents a neurobiological diverse group of conditions characterized by multiple functional deficits that are associated with pervasive disruption of development of social, communicative, educational behavioral, mood and emotional development and maturation. These multiply-handicapped individuals typically show developmental processes that are not merely showed or limited, but are also described with forms as "atypical" or "deviant."

How could one individual contain so much psychopathology? Sadly, for seriously compromised children, as Alex was, this is the rule, not the exception. Even more so are the environmental factors of familial violence, marked description of caretakers family description, violent child abuse and head injury.

Mr. Riofta's ability to communicate with professionals is severely compromised. Despite several hours of face-to-face contact, his speech pattern, tangential associations, lack of logic and ideational organization rendered significant parts of his communication confusing to the point of periodic incoherence.

Based on face-to-face contact and interview with Mr. Riofta, interview of his mother and limited psychological testing, it is the professional opinion of the undersigned that Alex Mam Riofta suffers from a severe psychiatric and neurologic defect that has and will continue to impair him into the indefinite future. Fully categorizing the nature and extent of the various defects will require a much more extensive psychiatric evaluation, a full neuropsychological test battery and careful medical

neurological evaluation, including electroencephalography and both structural and functional neuro imaging studies.

ASSESSMENT:

AXIS I

1. **Paranoid Disorder, Persecutory Type**
2. **Probable Attention Deficit Disorder, not otherwise specified**
3. **Pervasive Developmental Disorder of Childhood, not otherwise specified**
4. **Probable Oppositional Defiant Disorder of Childhood**
5. **Anxiety Disorder, not otherwise specified**
6. **Personality change, paranoid and aggressive type, due to serial traumatic brain injury**
7. **Possible Schizophreniform Disorder.**

AXIS II

1. **Paranoid Personality Disorder**

AXIS III

1. **History of multiple head injury**
2. **Motor Tick Disorder versus Myoclonic Disorder versus akathesia.**
3. **Recent facial perioral and ocular contusions**

AXIS IV

1. **Problem with Primary Support Group: Family of origin disruption, estrangement, inadequate discipline.**
2. **Educational problems: Low normal intelligence, academic failure.**
3. **Problem with Social Environment: Limited social support**
4. **Occupational Problem: Unemployment, serial job loss.**
5. **Problem Related to Interaction with Legal System/Crime: Arrest, incarceration.**

AXIS V

Global Assessment of Functioning Scale: 25. Behavior considerably influenced by delusions and hallucinations as well as serious impairment in communication.

Treatment Considerations

Definitive treatment recommendations should await further work up and review of pertinent past medical and psychiatric records. Treatment success depends upon correct diagnosis. However, some general comments can be tendered.

1) It is likely that Alex' hallucinations and delusions can be ameliorated or blocked with appropriate antipsychotic medication. While there is some utility to recommend one of the newer drugs that have fewer side effects, one of the older drugs may be required.

2) Cognitive based psychotherapy will be necessary to teach Alex how his anticipation of disillusionment by others may lead to that specific outcome, that is, teach him that behaves in a way to obtain confirmation of bias.

3) Some success has been achieved in adolescents and young adults with Conduct Disorders using newer antipsychotic medications. It is easily conceivable that the treatment options in 1) above would be helpful in the problem as well.

4) After 1) above, the consideration of antidepressants and/or psycho stimulants to attempt to address the probable Attention Deficit Hyperactivity Disorder would be appropriate. Several trials could be required.

5) Cognitive rehabilitation program available at University of Washington, might be able to assist Alex in partially overcoming his academic failures by developing and teaching him some specific cognitive skills and tools.

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Hallucinations in children with conduct and emotional disorders: I. The clinical phenomena

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SYNOPSIS In a retrospective study, children referred to the Maudsley Hospital with conduct or emotional disorders who also suffered from hallucinations were found to be older than other children seen with similar diagnoses, more of them had below-average IQs and they were more frequently admitted as in-patients. In most cases hallucinations were auditory. When compared with a group of 20 controls matched on these differentiating features, the 20 children with hallucinations had more precipitants of illness, a shorter duration of the disorder, symptoms of depression, and a family history of mood changes. They also had more symptoms suggestive of cognitive–perceptual dysfunction.

INTRODUCTION

Hallucinations in adults have been the subject of interest and study by many authors over the centuries (Evarts, 1962; West, 1962). Their presence has been related to a variety of psychiatric and physical conditions, and they have been studied experimentally in relation to sensory and sleep deprivation, psychological deficits, and direct brain stimulation (West, 1962; Keup, 1970; Ey, 1973; Slade, 1976).

The literature on perceptual disorders in children is far less extensive. Moreau de Tours (1888) is regarded as the first psychiatrist to have written systematically about hallucinations in children; he linked them to organic toxic states and to the 'adverse moral effects of reading fairy tales'. Since then, several authors have commented on the association between childhood imagination and hallucinations. Eisenberg (1962) described the difficulties in discussing subjective psychological experiences with children because of their limited level of self-expression and their tendency to indulge in fantasy or 'pretend' games.

However, it is possible for the observer to differentiate between child fantasy and reality activities. Despert (1948) studied the behaviour and communication during play of normal children aged 2–5 years attending a nursery. She showed that, even though fantasy activities were not uncommon, hallucinations were absent. Some children talked about their fantasies repeatedly, but these lacked the characteristics of perceptions. In some cases there were possible illusory or hallucinatory phenomena related to sleep. Children with the most creative imaginations were readily able to acknowledge their fantasies as 'pretend' rather than reality. Edgell & Kolvin (1972) have described the normal perceptual phenomena of children, which should be differentiated from hallucinations; these include imaginary companions, eidetic imagery, night terrors and other hypnagogic phenomena.

In children with psychiatric disorders, hallucinations are most frequent in the psychoses of late onset and they are one of the key features of this condition (Edgell & Kolvin, 1972; Kolvin *et al.* 1971; Eggers, 1973). They have also been described in reactive psychoses (Warren & Cameron, 1950), depressive syndromes (Pearce, 1974; Chambers *et al.* 1982), organic brain syndromes (Curran, 1963) and in temporal lobe epilepsy (Ounsted *et al.* 1966).

It is relatively rare for children with emotional and behavioural problems to experience hallucinations (Edgell & Kolvin, 1972), and different explanations have been proposed to account for their presence. They have been regarded as a

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absence of hallucinations. Secondly, case notes of 177 subjects seen over the years under study were checked for the existence of hallucinations. The total frequency of hallucinations in this group was 1·6%. The initial selection procedure had therefore failed to detect approximately one child with hallucinations in every 200 registered cases.

Since the method of selection had identified all the children with hallucinations in the various psychiatric conditions, it was possible to estimate their relative frequency according to psychiatric diagnosis. The symptom was frequent in children with psychoses of late onset (75%) and very rare in those with emotional or conduct disorders (0·5%).

Characteristics of the hallucinations

There was variation in the extent to which children described their perceptual experiences, except for modality, which was reported in every case. Auditory hallucinations were present most frequently (in 85%); visual hallucinations were present in 40%, olfactory in 15% and mixed modalities in 30% of cases.

Additional information was available for a number of cases. The duration of the symptom varied from one week to years; the frequency and duration of the experiences were not described with any precision. Specific episodes of hallucinating were brought about by stressful events, by distress, by naughtiness or by temper. Nine of the 20 children were said to be anxious and frightened while the experiences took place, and in 4 cases the children actually fought them, refusing to obey hallucinatory orders. With regard to the contents of the auditory phenomena, three-quarters of the children reported that the voices were addressed to them, and in half of these children the voices asked them to do something wrong; unpleasant or threatening comments were heard by over one third. Voices were located inside the head in 7 cases and outside in 5 cases. An example of a child with auditory hallucinations was that of a 12-year-old boy, reported as hearing a voice from within which was like his thoughts being spoken, night and day, and talking about others. Sometimes he heard voices telling him to do something wrong. The voices had been present for the previous year and stopped some time prior to being seen. He seemed very frightened when hearing the voices, and would get into a panic attack for 15 minutes.

With regard to visual hallucinations, 3 subjects reported seeing frightening objects such as skeletons or ghosts, and on 3 occasions children talked about seeing recently deceased people. An example of a child with visual hallucinations was a 10-year-old boy who had been seeing skeletons at night. During the interview at the hospital, he described the skeletons he was seeing; he started hitting out at them and seemed very concerned. He was said to become terrified when seeing the skeletons.

Comparison between children with hallucinations and unmatched controls

Children with hallucinations had a mean age of 12·15 years, with a standard deviation of 2·4; the age range was 8–16 years. There were slightly more males among them; most were of normal intelligence; and the diagnoses were emotional and conduct disorders (Table 1).

In comparison with the 29 unmatched controls with conduct or emotional disorders, there were no differences in sex distribution. However, children with hallucinations were older; more of them had below-average levels of intelligence; and they had been admitted to hospital as in-patients more frequently.

Comparison between children with hallucinations and matched controls

Table 2 lists items which differentiated between the two groups at a significant or near significant statistical level: all were more frequent in the group of children with hallucinations. Some differences were in the patterns of disorder and in mood; others were in the area of perceptual and cognitive functioning.

Precipitants of illness were present in the histories of most children with hallucinations, with changes of school, admission to hospital and actual or threatened separations from their parents. Loss of friends or relatives by death was mentioned as a precipitant in 5 index children, and was only suspected as a precipitant in one of the controls. Interestingly, hallucinations in these bereaved children tended to represent the dead person. A shorter duration of illness, of less than 6 months, was present in almost half the index children; the symptom of depression with

Table.1. *Comparison between hallucinating children and unmatched controls*

	Children with hallucinations ($N = 20$) No. (%)	Unmatched controls ($N = 29$) No. (%)	Statistical significance
Sex			
Female/male ratio	8/12	12/17	NS
Age (years)			
0–7	— (—)	7 (24)	$\chi^2 = 7{\cdot}14$, df = 2, $P = 0{\cdot}03$
8–11	8 (40)	5 (17)	
12–16	12 (60)	17 (58)	
IQ			
< 85	5 (25)	— (—)	$\chi^2 = 8{\cdot}80$, df = 2, $P = 0{\cdot}02$
85–114	12 (60)	26 (89)	
> 114	3 (15)	3 (10)	
Diagnosis			
Emotional disorders	6 (30)	13 (44)	NS
Conduct disorders	14 (70)	16 (55)	
In-patients	12 (60)	7 (24)	$\chi^2 = 4{\cdot}99$, df = 1, $P < 0{\cdot}05$

Table 2. *Comparison between hallucinating children and matched controls*

	Children hallucinations ($N = 20$)	Controls ($N = 20$)	Statistical significance
Precipitants of illness	16	5	$\chi^2 = 13{\cdot}02$, df = 2, $P = 0{\cdot}001$
Suspected	—	4	
Duration of disorder			
6 months	9	—	$\chi^2 = 13{\cdot}41$, df = 4, $P = 0{\cdot}009$
6 months–1 year	1	4	
1–2 years	1	4	
2–3 years	5	5	
3 years	4	7	
Depression	15	9	$\chi^2 = 8{\cdot}61$, df = 2, $P = 0{\cdot}01$
Suspected	—	7	
Anxiety	13	6	$\chi^2 = 5{\cdot}15$, df = 2, NS
Suspected	1	1	
Family affective disorders*	5	5	$\chi^2 = 6{\cdot}61$, df = 2, $P = 0{\cdot}03$
Suspected	5	—	
Episodic disturbances of behaviour	15	7	$\chi^2 = 4{\cdot}94$, df = 1, $P = 0{\cdot}02$
Symptoms suggesting neurotic derealization	5	1	$\chi^2 = 7{\cdot}24$, df = 2, $P = 0{\cdot}02$
Suspected	3	—	
Other perceptual disorders	6	—	$\chi^2 = 10{\cdot}0$, df = 2, $P = 0{\cdot}006$
Suspected	2	—	
EEG abnormalities†	2	1	$\chi^2 = 3{\cdot}40$, df = 2, NS
Suspected	7	3	
Verbal/Performance discrepancies on intellectual testing‡	6	1	$\chi^2 = 5{\cdot}08$, df = 1, $P = 0{\cdot}02$

* This information was available on 37 cases (19 index children and 18 controls).
† Thirty children had had EEGs.
‡ Thirty-four children were tested.

misery and tearfulness was present in three-quarters (but suspected in more controls than index subjects); and a family history of affective disorders was present or suspected in half. Affective illness in the family was scored as present when a severe illness, usually with psychiatric treatment, was reported. This was equally frequent in both groups; however, affective illness in the family was suspected (i.e. relatives were said to suffer 'from nerves', with excessive anxiety or depressive symptoms) in a quarter of index children and no controls. The symptom of anxiety was more common in the children with hallucinations, but the difference was not statistically significant.

The other differentiating factors were in the sphere of perceptual and cognitive abnormalities. None of these symptoms was a clear organic indicator, since subjects with organic and epileptic conditions had been excluded. Episodic disturbances of behaviour were present in three-quarters of the children with hallucinations. They were defined as transient episodes of disturbed behaviour which could not be explained by environmental precipitants or provocation, and consisted of sudden giddiness, paleness or withdrawal, sudden unexplained panic attacks, or severe tantrums with possible neurological features. A description of a 10-year-old boy read as follows: 'at times he goes pale for 10 minutes or so; it happens two or three times a week'. A 12-year-old boy was said to become 'briefly withdrawn and staring and he stops what he is doing'. A 13-year-old girl had 'sudden attacks, with sudden beginning and end, when she screams and runs around barefooted in the streets; they are unpredictable and last about half an hour. She says that during her excitable periods she feels like riding on horses; occasionally she lies down when aggressive, cuts herself, complains of abdominal pains and weakness in the hands, and she makes sexual allegations against her step-father.'

Symptoms suggestive of neurotic derealization or depersonalization were present in one quarter of the index children. A 15-year-old girl complained of feeling on occasions 'in a daze', 'when I look the world is there, but it is not really there'. A 10-year-old boy described his experience like this: 'the ceiling looks as if floating and the car seems to go ever so fast'. A 14-year-old girl would 'look somewhat perplexed, with the unpleasant feeling of being half asleep and half awake'. Other perceptual disorders, such as objects changing shape or colour, were reported by a third of the children with hallucinations.

Verbal/Performance discrepancies of more than 20 points on intellectual testing occurred in 42% of the children with hallucinations and in only one control (5%). In 2 out of the 6 index cases, the Verbal scores were higher (the actual Verbal/Performance scores were 123/89, 118/76, 82/103, 95/115, 114/81 and 83/63 in the index children; and 99/136 in the control subject).

Reports were available for the EEGs of 15 subjects in each group. Abnormalities were present or were suspected more frequently in the index group (two thirds of those tested), but the difference with controls failed to reach statistical significance. EEG abnormalities were, for the most part, non-specific but, interestingly, in view of the perceptual and emotional experiences among the children with hallucinations, slow wave or sharp wave foci on the posterior temporal regions were more frequent in the index children (6 index children and only 2 controls; $0{\cdot}05 < P < 0{\cdot}1$).

Table 3 lists features which have been associated with hallucinations in the literature, though not in this study. They include socio-economic status, inadequate social stimulation or social deprivation, sensory deficits, and reports of vivid imagination or a tendency to daydream.

Table 3. *Features associated with hallucinations in the literature: comparison between hallucinating children and matched controls*

	Children with hallucinations ($N = 20$)		Controls ($N = 20$)	
	No.	(%)	No.	(%)
Vivid imagination	4	(20)	3	(15)
Day-dreaming	4	(20)	10	(50)
Insomnia	2	(10)	6	(30)
Deafness	1	(5)	3	(15)
Bereavement as a precipitant	4	(20)	—	
Inadequate social stimulation	3	(15)	—	
Socio-economic level				
I–II	1	(5)	3	(15)
III	12	(60)	12	(60)
IV	7	(35)	5	(25)

School refusal was more common in the controls (in 70% of controls, and 30% of index children; $\chi^2 = 7{\cdot}20$, df = 2, $P = 0{\cdot}02$), as were family stresses such as physical illness in the family or financial problems (present in 55% of controls and 25% of index children; $\chi^2 = 7{\cdot}15$, df = 2, $P = 0{\cdot}02$).

DISCUSSION

The frequency of hallucinations as a symptom of psychiatric disorder was low (1·1%). This is an underestimate, because the selection procedure had resulted in the loss of some cases but, probably more crucially, because the investigation was not based on first-hand information. Furer *et al.* (1957) have shown the importance of direct detailed questioning to elicit hallucinations in children, which otherwise are easily missed. The present figure is derived from a mixed in- and out-patient population. It is intermediate between the figure of 0·4% reported in a retrospective study of out-patients by Eisenberg (1962) and that of 5% found by Edgell & Kolvin (1972) using a prospective design in a small sample of in-patients. In-patient status is of importance when comparing frequencies in different studies, because children with hallucinations are more likely to be admitted as in-patients. As in previous work (Edgell & Kolvin, 1972; Eisenberg, 1962), hallucinations were common in the psychoses of late onset and they were rare in children with emotional and conduct disorders.

Non-psychotic children with hallucinations were older than the generality of cases seen at the hospital. In line with previous reports, none was under 7 years of age (Despert, 1948; Bender, 1970). Even in the psychoses of late onset, hallucinations are usually not reported before 7 years (Eggers, 1973; Wieck, 1965). It cannot be concluded that young children do not hallucinate. In the selection procedure for this study, one child under 5 years was excluded because hallucinations were part of a toxic state resulting from the ingestion of dexamphetamine. It is probable that, in children under 7 years, limitations in cognitive development militate against the effective communication of hallucinations to others, unless they are experienced with the immediacy characteristic of toxic states. Young children would have difficulties, not in differentiating self-induced fantasies or 'pretend' activities from reality (Despert, 1948; Eisenberg, 1962), but in knowing the difference between dreams and other subjective phenomena like hallucinations. Despert (1948), in her study of 2–5 year olds attending a nursery, noted that although some of the children related hypnagogic experiences, it was impossible to obtain sufficient evidence from the children themselves to conclude that the experiences were true hypnagogic hallucinations and not dreams. Piaget (1974) points out that, until 7–8 years of age, dreams are still systematically considered as objective reality, 'as a sort of ethereal picture floating in the air and fixed before the eyes'. Perceptual immaturity can contribute to this. Work conducted on the development of perception and attention in children indicates that, as with tactile searching, the adult pattern of visual searching, in which more attention is paid to the most informative points of the stimulus, is not reached until the age of 6 years (Walker, 1980).

Developmental issues could also be related to the localization of hallucinations in space. Bender (1970) and Furer *et al.* (1957) have emphasized the shift from an internal to an external location of voices with age. The present data, though incomplete in respect of localization, also suggest a maturational component, since the auditory phenomena were located predominantly in internal space before the age of 13, and in external space thereafter.

The clinical picture of the children with hallucinations was that of the emotional and conduct disorders. There were relatively few differences between these children and the matched controls with similar diagnoses, whereas there were marked differences from a group of subjects with psychoses of late onset and hallucinations (Garralda, 1981). The psychotic diagnosis was characterized by delusional beliefs, disorders in the production of language, diminished motor activity, incongruous mood, bizarre behaviour and social withdrawal.

The increased precipitants of illness, depressive symptoms, family history of mood change, and shorter illness in the non-psychotic children with hallucinations when compared with controls suggest that an affective predisposition to symptomatology in response to stressful events may be linked to perceptual symptoms. Previous work has found mood changes in children with hallucinations (Lukianowicz, 1969). Possibly the severity of the mood change may have been

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about the perceptual abnormalities, but the finding of bereavement as a precipitant in some of the children suggests that the type of stress was probably also relevant, and that there may be an increased risk of hallucinations in bereaved children. The differentiating features in the area of perceptual–cognitive dysfunction (i.e. episodic disturbances of behaviour, suspected derealization, other perceptual disorders and Verbal/Performance discrepancies) were an unexpected finding. They allow for different interpretations. The episodic disturbances of behaviour in conjunction with the affective symptoms could be regarded:

(1) As psychological manifestations of highly charged emotional states, or self-induced withdrawal from reality, as in hysterical states. A better and contemporary understanding of the antecedents of the behaviour could have led to plausible explanations for the symptoms.

(2) As part of a depressive syndrome. Lewis (1934) described hallucinations, perplexity, derealization, and changes in levels of consciousness in adult depressives.

(3) As 'soft' indicators of brain dysfunction. This is given some support by the statistically significant associations found between these episodes, suspected abnormalities on the EEG (present in 90% of children with episodes and 55% of the rest) ($\chi^2 = 4{\cdot}84$, df = 1, $P = 0{\cdot}02$), and symptoms suggestive of derealization (in 27% – suspected in a further 13% – of children with episodes and none of the rest) ($\chi^2 = 9{\cdot}50$, df = 2, $P = 0{\cdot}008$); moreover, all the 8 children with temporal foci on the EEG had episodic disturbances of behaviour. Harper & Roth (1962), comparing patients with temporal lobe epilepsy and subjects suffering from the anxiety–depersonalization syndrome, highlighted the similarities between cognitive–perceptual abnormalities of the kind described above and temporal lobe phenomena. Goldie & Green (1961) have described episodes of 'bewilderment' in patients suffering from petit mal. However, the ambiguities inherent in any 'soft' organic indicators, the limitations of the retrospective nature of our data for the assessment of psychologically complex symptoms, and the varying forms in which these were manifested, all emphasize the tentative nature of this interpretation and call for further clarifying research.

Beyond reflecting unusual cognitive styles, the meaning of the Verbal/Performance discrepancies on IQ testing is hard to evaluate. In adults, discrepancies of this kind have been associated with diffuse brain damage (Lishman, 1978), but their value as indicators of brain damage in children has been called into question (Rutter *et al.* 1970). In this study they were not related to EEG abnormalities, temporal lobe foci, depersonalization or episodic disturbances of behaviour. However, taken in conjunction with the relative lower IQs of children with hallucinations, they suggest a link between the perceptual phenomena and cognitive deficits.

There were no associations between low socio-economic status, vivid imagination and hallucinations. Social deprivation has been regarded in the American literature as a contributory factor (Eisenberg, 1962; Wilking & Paoli, 1966; Bender, 1970). Methodological and sampling differences may account for the discrepancy in the findings, since previous work lacked controls and severe deprivation was hardly reported in this sample. With regard to vividness of imagination, this study examined personality characteristics of the children as reported by the parents in the histories, whereas studies of adults which have found an association between hallucinations and vivid imagination have been based on experimental work using discriminating measures of imagination (Mintz & Alpert, 1972).

To conclude, the study confirmed the existence of hallucinations in children with non-psychotic disorders and suggested a maturational aspect in the location in space of hallucinations. It showed an association between hallucinations, mood changes and perceptual–cognitive abnormalities. However, since the results are based on retrospective data and on a small group of children, they should be regarded as tentative and requiring confirmation. They suggest that further study of the quality and severity of the mood changes and of physiological correlates could add useful information for the understanding of the phenomena in children. The role of bereavement, socio-economic deprivation and imagination in children also deserves further clarification.

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Reliability and Accuracy of Differentiating Pervasive Developmental Disorder Subtypes

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ABSTRACT

Objective: To evaluate the ability of the *DSM-IV* criteria for the pervasive developmental disorders (PDD) to reliably and accurately differentiate PDD subtypes. **Method:** The sample consisted of 143 children with various types of developmental disabilities. A diagnosis of PDD and PDD subtype was made by one clinician using information obtained from the Autism Diagnostic Interview-Revised and the Autism Diagnostic Observation Schedule. The raw data from the Autism Diagnostic Interview-Revised, clinical notes (excluding diagnostic opinion), Autism Diagnostic Observation Schedule, IQ, and other available data were independently assessed by three experienced raters, each of whom then made a separate, blind diagnosis. If there was any disagreement, a consensus best-estimate (CBE) diagnosis was made after discussion. To assess reliability, the agreement between the three raters was calculated using κ. Accuracy was assessed by calculating the agreement between the clinician's diagnosis and the CBE and by calculating the error rates associated with the three raters using latent class analysis. **Results:** The current *DSM-IV* criteria show good to excellent reliability for the diagnosis of PDD, Asperger's disorder (AsD), and autism, but they show poor reliability for the diagnosis of atypical autism. The clinician (compared to the CBE) had little difficulty differentiating PDD from non-PDD children and autism from AsD but had more difficulty identifying children with atypical autism. The latent class analysis also showed that the average error rates of the three raters for a differentiation of atypical autism from autism were unacceptably high. **Conclusions:** Although the psychometric properties of the current *DSM-IV* criteria for autism and AsD appear quite acceptable, there is likely to be a high rate of misclassification of children given a diagnosis of atypical autism. *J. Am. Acad. Child Adolesc. Psychiatry*, 1998, 37(3):278–285. **Key Words:** pervasive developmental disorder subtypes, diagnosis, reliability, accuracy.

The classification and diagnosis of autism have changed as our understanding of the key features and associated characteristics of the condition have improved. *DSM-III* (American Psychiatric Association, 1980) and *DSM-III-R* (American Psychiatric Association, 1987) contained criteria for autism which were quite different from each other and from those of the *International Classification of Diseases (ICD)*, the classification used by the World Health Organization. The criteria used in *ICD-10* (World Health Organization, 1992) and, recently, *DSM-IV* (American Psychiatric Association, 1994) are different again from their previous versions but essentially similar to each other, so that future studies conducted in different countries will be more comparable.

Prior to *DSM-III*, there was concern about a group of children who had some of the features of autism but were missing one essential component or in whom the severity of impairment was not believed to be enough to justify the diagnosis of autism. Various labels were used

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to describe this group of children, but the vague nature of the diagnosis was unsatisfactory (Dahl et al., 1986). This led to the concept of pervasive developmental disorders (PDD) as an umbrella term for a group of related disorders characterized by a continuum of autistic features (Wing and Gould, 1979). With *DSM-IV*, children previously identified with a form of PDD other than autism could now be classified as having PDD-NOS (or atypical autism), Asperger's disorder (AsD), Rett's disorder, or disintegrative disorder.

Unfortunately, there are few data on the reliability of these new diagnostic criteria. In the *DSM-IV* autism/PDD field trial (Volkmar et al., 1994), 131 cases were rated by two or more clinicians who had access to all clinical information (including the previous clinical diagnosis). The overall κ value for agreement between two clinicians for autism versus non-PDD was .95, but in differentiating between autism and other PDD, the κ value fell to .65. This finding suggested the *DSM-IV* criteria are potentially useful in classifying persons with PDD, but the differentiation of autism from other PDD was more difficult to accomplish reliably. Moreover, the fact that the *DSM-IV* criteria were not assigned by raters who were blind to the original clinical diagnosis may have inflated the κ values.

Another important issue is the extent to which PDD subtypes can be differentiated *accurately*. Autism, AsD, and atypical autism share many diagnostic features but differ either on age at onset, symptom count, or the absence of "clinically significant cognitive and language delay." The problem is that to assess validity or "accuracy," the differentiation must be compared to a method that can measure autism and other PDD subtypes without error; that is, the classification must be compared to a "gold standard." Unfortunately, there is currently no diagnostic method that meets this requirement.

In the absence of a gold standard, many investigators have argued that a best-estimate method is the most accurate way to make a diagnosis (Leckman et al., 1982). In a best estimate, all available clinical information including structured or semistructured interviews is reviewed by two or more experts who independently make a diagnosis. If there is disagreement, a consensus is reached after some discussion. The probability of an accurate assignment is increased by using multiple raters and several types of data and by minimizing potential sources of bias. However, even the best estimate will have some measurement error associated with it. Thus, if a best estimate is used as the gold standard, it is impossible to determine precisely the diagnostic error rates associated with a clinician's diagnosis. When comparing the clinician's interview with the "best-estimate" approach, the clinician's apparent sensitivity and specificity values would incorporate the combination of diagnostic errors associated with *both* the clinical interview and the best estimate. Hence, the apparent accuracy of the clinician would be negatively biased.

Alternatively, latent class (LC) methods have been applied to a variety of situations in which it is not possible to measure a construct without error (Hui and Walter, 1980; Rindskopf and Rindskopf, 1986). The advantage of using an LC approach is that there is no requirement that a gold standard method for diagnosis exist. Each available method is more or less accurate depending on its psychometric properties. The accuracy of each method can be estimated using maximum likelihood techniques (Walter and Irwig, 1988) based on the combination of results observed for each subject. Instead of assuming (probably incorrectly) that a definitive diagnosis is possible, one estimates the relative likelihood of each competing diagnosis as a function of the estimated sensitivity and specificity of each method. We recently applied these techniques to a comparison of *DSM-III*, *DSM-III-R*, and *ICD-10* criteria for autism and showed that *ICD-10* was the most accurate diagnostic system (Szatmari et al., 1995b). Now that the *DSM-IV*/*ICD-10* criteria have been adopted worldwide, it is important to estimate the errors associated with making a diagnosis of the other PDD subtypes using these criteria.

As part of a study on the genetics of PDD (Szatmari et al., 1996), we investigated the reliability and accuracy of differentiating PDD subtypes by using the *DSM-IV* criteria and a variety of methods: a clinician's interview, standardized instruments, a consensus best-estimate (CBE) diagnosis, and latent class analysis (LCA). Reliability was assessed by measuring agreement between three raters on the assignment of PDD subtypes based on their review of all clinical data. We conjectured that the agreement on whether or not a child had PDD would be much better than the agreement on specific PDD subtype. Accuracy was assessed in two ways because, in the absence of a true gold standard, no single analysis can provide unequivocal evidence of diagnostic accuracy. First, the clinician's diagnosis was compared with the CBE diagnosis. Second, the accuracy of the three raters themselves was estimated using LCA.

TABLE 1
Sample Characteristics

	Autism (n = 93)	Asperger (n = 11)	Atypical (n = 22)	Non-PDD (n = 17)
Age, months (SD)*	123.11 (91.80)	110.55 (36.44)	89.23 (31.63)	85.41 (39.82)
Male/female	66/27	11/0	17/5	14/3
MPX/SPX	55/38	8/3	16/6	2/15
Leiter IQ (SD)**	71.23 (25.91)	94.56 (27.83)	77.72 (20.69)	104.00 (14.14)
IQ (no. unavailable)	12	2	3	15

Note: PDD = pervasive developmental disorders; MPX = families with two or more children affected with PDD; SPX = families with only one child affected with PDD.
* F = 1.97, p = not significant; ** F = 3.27, p = .025.

METHOD

Subjects

Participants from multiplex PDD families (that is, families with two or more children affected with PDD) were recruited from across southern Ontario, from case files at our facility, and from screening families through the Autism Society of Ontario as well as other agencies providing services to persons with autism. A consecutive series of singleton subjects with siblings were recruited from the clinical population attending the Chedoke Child and Family Centre. Singleton males were matched by age to males in the multiple-incidence families. PDD females were oversampled for purposes of genetic analyses but could not be matched to multiplex families because of the low rate of females in the multiplex families. Entry criteria were (1) absence of any identifiable neurological or chromosomal condition that has known genetic implications (including DNA testing for the *FMR-1* gene) and (2) a possible diagnosis of PDD made by a referring health professional. There were 81 subjects from multiplex families and one set of identical twins. Forty-two subjects were from singleton families. There was also a consecutive series of cases referred for a diagnosis of PDD but assessed by the clinician as non-PDD. In total there were 108 males and 35 females (mean age, 113.1 months; range, 29 through 482 months) at the time of the administration of the Autism Diagnostic Interview-Revised (ADI-R) (Table 1). IQ data were available for 111 individuals. Resources did not permit us to complete IQ testing for the children who had a non-PDD diagnosis. The mean nonverbal IQ was 67.6 (SD, 30.09; range, 24 through 143). The characteristics of the sample are given in Table 1 according to the final CBE diagnosis of the three raters (see below). There were no cases of Rett's or disintegrative disorder diagnosed by CBE. Ninety-three children were given a CBE diagnosis of autism, 11 a final diagnosis of AsD, 22 a diagnosis of atypical autism, and 17 a non-PDD diagnosis (all with various types of language disorder).

Procedure

The procedure is outlined in Figure 1. Initially, all subjects were clinically assessed (by P.S.) using available clinical records, the ADI-R (Lord et al., 1994), and the Autism Diagnostic Observation Schedule (ADOS) (Lord et al., 1989) (step 1). Using these data, a "clinician" diagnosis was made. The Vineland Adaptive Behavior Scales and the Autism Behavior Checklist (ABC) were then administered to parents, and cognitive testing was completed with the children. The raw data from the ADOS and ADI-R, the clinical notes, the ABC, Vineland standard scores, and IQ data were forwarded to an "expert panel" of three other raters. Available clinical reports from current and previous assessments (including speech and language assessments, psychometric testing, pediatric-psychiatric consultations) were also provided to the panel, but information about the diagnostic conclusions and any other potentially identifying data were removed (step 2).

The panel consisted of three members with an average of 20 years' experience in the diagnosis of PDD. The panel spent several sessions reviewing cases not included in the study to establish the feasibility of the process, discuss the application of the criteria, and develop the consensus process. Subsequently, case files were given to the panel in random order. The panel was blind to any diagnoses by

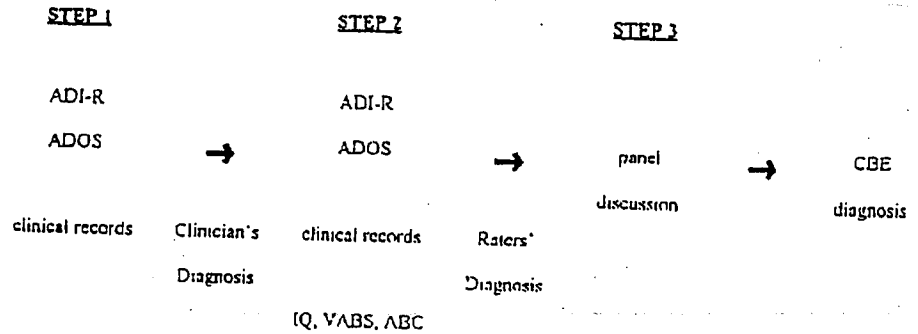

Fig. 1 Study procedure. ADI-R = Autism Diagnostic Interview-Revised; ADOS = Autism Diagnostic Observation Schedule; VABS = Vineland Adaptive Behavior Scales; ABC = Autism Behavior Checklist; CBE = consensus best-estimate.

previous clinicians or by the ADI-R; family history; and whether or not the case came from a family with several potential cases of PDD. Each member of the panel independently reviewed the available information and made a single diagnosis (the rater's diagnosis) according to *DSM-IV* criteria. If there was any disagreement about a case, a discussion was held and a CBE diagnosis was reached (step 3).

The *DSM-IV* criteria for AsD state that a child must meet the social impairment and repetitive behaviors criteria for autism but *not* meet full criteria for the latter diagnosis. Applying these criteria, we had found (using an earlier sample) that only 1 of 21 children (who were given a clinical diagnosis of AsD) met *DSM-IV* criteria (Szatmari et al., 1995a). We concluded that these criteria were unworkable, a finding confirmed by Miller and Ozonoff (1997). Therefore, the *DSM-IV* criteria for AsD were modified as follows: if a child met criteria for both autism and AsD, the child was given a diagnosis of AsD. Children from another study classified with AsD in this way have a better outcome 2 years later than children with autism, confirming the predictive validity of this modification (Szatmari et al., unpublished). The *DSM-IV* criteria for atypical autism (PDD-NOS) were not modified. Children with this PDD subtype had evidence of impairments in reciprocal social interaction and in communication, and they had a pattern of repetitive, stereotypic activities but could be atypical in age at onset (i.e., after 3 years) or else were subthreshold on one or more of the three domains.

Instruments

Autism Diagnostic Interview-Revised. The ADI-R (Lord et al., 1994) is a semistructured interview conducted with the primary caregiver(s) of the child. It is designed to obtain detailed description of the behaviors necessary to make a diagnosis of autism (Rutter et al., 1990). The interviewer systematically inquires about impairments in reciprocal social interaction, verbal and nonverbal communication, and a pattern of repetitive stereotypic activities. The questions are designed to distinguish qualitative impairments from developmental delays by assessing behaviors relative to mental age, identifying behaviors that would be considered deviant at any age, and examining current and most abnormal behaviors for those behaviors strongly influenced by maturational age.

Autism Diagnostic Observation Schedule. The ADOS (Lord et al., 1989) is a direct assessment designed to make a diagnosis of PDD based on a 20-minute structured observation of the child. The examiner engages the child in nine separate activities designed to elicit behaviors specific to PDD. The focus of the ADOS is on social and communicative behaviors with less attention to specific autistic-type movements, behavior difficulties, and sensory interests.

Autism Behavior Checklist. The ABC (Krug et al., 1980), a checklist filled out by a parent, contains 57 items measuring a wide range of PDD symptoms within five areas: language, relating, body and object use, sensory stimulation, social and self-help. Each behavioral description is scored as present or absent. Items are weighted in order to arrive at subscale and total scores, with higher scores indicating more PDD symptoms.

Vineland Adaptive Behavior Scales. The Vineland Adaptive Behavior Scales is also a semistructured interview administered to a parent. This scale is designed to assess adaptive behavior in the domains of socialization, communication, motor and daily living skills (Sparrow et al., 1984). The communication and socialization scores, and their relation to parameters such as IQ, are seen as very sensitive measures of impairment in children with PDD (Volkmar et al., 1987).

Intelligence Measures. Psychometric testing was conducted with the Leiter Performance Scales (Levine, 1986) and age-appropriate Wechsler intelligence tests (Wechsler, 1967, 1974, 1981). In the event that neither Leiter nor Wechsler data were available but another valid intelligence measure from clinical records was available, this score was used.

Analysis

Three separate methods of classification were used in this study: the clinician's diagnosis; the independent, blind judgment made by three raters, based on all information (the rater's diagnosis); and the CBE diagnosis. Three main analyses were carried out to assess reliability and accuracy. To measure reliability, the agreement between the three raters of the expert panel (the rater's diagnosis) was estimated using κ. The analysis was completed for the differentiation of all PDD versus non-PDD children and for the differentiation of PDD subtypes. A category-specific κ was calculated in one analysis and conditional probabilities were also calculated to estimate the probability that two random raters would agree on PDD subtype (Holman, 1984).

Accuracy was first assessed by measuring the agreement between the clinician's diagnosis and the CBE diagnosis on all children in the sample. An overall κ was calculated, as well as the category-specific κ values for each PDD subtype. The limitation of this analysis is that the clinician saw the child, whereas the three raters had access only to the raw data. Thus any lack of agreement may reflect information variance rather than pure measurement error. In addition, without an observable gold standard, the error associated with the CBE is not taken into account. The measurement error associated with the three raters (who make up the CBE diagnosis), however, can be estimated using LCA. In addition, the three raters used identical data sets so there is no information variance. The LC approach assumes that a diagnostic class such as autism or atypical autism exists but cannot be measured without error. LC models require at least three independent observations per subject (in this case a diagnosis by the three raters). The pattern of agreement is modeled using maximum likelihood techniques, and the solution that best fits the observed data is selected. The fitted model gives estimates of the prevalence of the disorder and false-positive (1 – specificity) and false-negative (1 – sensitivity) error rates associated with each rater. The mean false-positive and false-negative error rates of the three raters are reported here because the individual error rates are of little value.

The estimates assume that the errors of observations on a given subject are conditionally independent, given the true latent state of the subject. With only three observations per subject, however, the model is saturated and there are no degrees of freedom available to measure the goodness-of-fit of the model and to test this assumption. This technique has been used in a variety of epidemiological settings and for several psychiatric diagnoses (Wells et al., 1995; Young, 1982; Young et al., 1982). Further details of the LC method can be found in Walter and Irwig (1988), Szatmari et al. (1995b), and Formann and Kohlmann (1996).

The LCA was completed for three differentiations: autism versus non-PDD, autism versus AsD, and autism versus atypical autism. Although it is possible to use the LC method for multilevel classifications, it is much more difficult, particularly given the small sample size available here (Formann and Kohlmann, 1996). To complete this analysis, an initial determination was required to decide which cases to include. It would not be appropriate to use the CBE diagnosis because it was based on the three raters' diagnoses, making the analysis potentially biased. Therefore, the *clinicians'* diagnoses of autism, AsD, atypical autism, and non-PDD were used to select cases for the LCA. Thus, the errors of the three raters are independent of the sample selection.

TABLE 2
Diagnosis by Raters, Clinicians, and CBE (N = 143)

Category	Rater 1	Rater 2	Rater 3	Clinician	CBE
Autism	97	93	86	92	93
Asperger	15	11	11	17	11
Atypical	8	19	24	16	22
Non-PDD	23	20	22	18	17
Total	143	143	143	143	143

Note: CBE = consensus best-estimate diagnosis; PDD = pervasive developmental disorders.

TABLE 3
Estimated Conditional Probabilities for PDD Subtypes and for Non-PDD Children

Diagnosis by First Rater	Diagnosis by Second Rater			
	Autism	Asperger	Atypical	Non-PDD
Autism	.84	.03	.10	.03
Asperger	.22	.59	.12	.07
Atypical	.52	.09	.27	.12
Non-PDD	.15	.04	.09	.72

Note: PDD = pervasive developmental disorders.

RESULTS

One hundred forty-three cases were entered into the study and submitted to the panel for an assignment of diagnosis. Each rater diagnosed PDD in similar numbers of children (Table 2). Of the 143 subjects, in 112 instances, all three raters agreed that the child had PDD, and they unanimously agreed the child did *not* have PDD in another 13 cases (not shown), indicating an excellent rate of unanimous agreement (91%) with a κ = .67. Thus, the three raters were able to reliably differentiate PDD from non-PDD children. The conditional probabilities derived from the agreement table indicate that if one randomly selected rater gives a child a diagnosis of PDD, there is a 95% probability that another rater will give the child the same diagnosis.

The next question addressed how well the three raters were able to agree on the PDD subtype. The raters diagnosed autism in between 60.1% and 67.8% of children (see Table 2). There was also little variation in the percentage of children assigned the AsD diagnosis by the three raters: 7.7% to 10.4%. The percentages of children with atypical autism, however, were very different for the three raters: 5.6%, 13.3%, and 16.8%. For the three PDD subtypes found in this sample, the overall observed agreement was 73% and κ was .51, indicating only moderate reliability in differentiating PDD subtypes. However, the category-specific agreement varied widely according to subtype. For example, the agreement among the three raters was excellent for non-PDD (κ = .67), good for AsD (κ = .56) and autism (κ = .55), but lower for atypical autism (κ = .18).

The table of conditional probabilities illustrates this quite well (Table 3). If one random rater gave a child a diagnosis of autism, then another randomly chosen rater would give the child the same diagnosis in 84% of the cases. Similarly, there is a 59% probability that if one rater gave a child a diagnosis of AsD, another rater would give the same diagnosis. However, if one rater gave a diagnosis of atypical autism, there was only a 27% probability that another rater would give the same diagnosis. Instead, there was a 52% chance that another rater would give the child a diagnosis of autism! In summary, it does not appear possible to reliably differentiate children with atypical autism from other PDD children using the *DSM-IV* criteria.

Another issue is the accuracy of differentiating PDD subtypes. Table 4 presents data on the agreement between the clinician's diagnoses and the CBE. Among the 143 children, the clinician and the CBE found roughly equal numbers of cases of autism and non-PDD diagnoses. Relative to the CBE, the clinician diagnosed more cases of AsD and fewer cases of atypical autism. The overall κ was .55, but once again the category-specific κ values give a more meaningful picture: for autism κ was .56, for AsD κ was .52, for atypical autism κ was .29, and for non-PDD κ was .81. Fifty percent (11/22) of children given a diagnosis of atypical autism by CBE were given a diagnosis of autism by the clinician, and 50% of those assigned a diagnosis of atypical autism (8/16) by the clinician were given a diagnosis of autism by CBE.

The LCA estimated the measurement error of the three raters. The first LCA examined the accuracy of

TABLE 4
Agreement Between CBE and Clinician

Clinician	CBE				
	Autism	Asperger	Atypical	Non-PDD	Total
Autism	78	2	11	1	92
Asperger	6	8	3	0	17
Atypical	8	0	7	1	16
Non-PDD	1	1	1	15	18
Total	93	11	22	17	143

Note: CBE = consensus best-estimate diagnosis.

the raters in differentiating autistic from non-PDD children (among children given either of these diagnoses by the clinician: $n = 110$). There were 64 cases with unanimous agreement among the three raters that a child had autism and 18 cases that a child had a non-PDD diagnosis. The mean average false-negative error rate was .05, and the average false-positive error rate was .20. This indicates that the three raters are able to differentiate autistic children from those with non-PDD diagnoses with little difficulty. If anything, there was a greater trend to "overdiagnose" non-PDD children as autistic rather than miss "true" cases of autism.

The second LCA assessed the identification of "true" cases of AsD among children given a diagnosis of AsD or autism by the clinician ($n = 109$). There were 6 cases in which all three raters agreed a child had AsD, and 91 in which there was unanimous agreement a child did not have AsD. In this instance, the average false-negative rate was again very low (.13); as was the average false-positive rate (.03).

The results of the differentiation of atypical autism from autism were quite different. Of the 108 children given either of these diagnoses by the clinician, the three raters unanimously agreed that only 1 had atypical autism and 76 did not have atypical autism. Although the average false-positive error rate was very low (.06), the false-negative error rate was unacceptably high (.49). In other words, on average, 49% of the "true" cases of atypical autism were misdiagnosed as autism by the raters. Thus, the three raters could not accurately differentiate children with atypical autism from other autistic children relative to the latent, "true" diagnosis.

DISCUSSION

The results of the analysis of reliability can be summarized as follows: first, the *DSM-IV* criteria for PDD and for autism were reliably applied by expert raters; second, a modified version of these criteria for AsD is also reliable; third, the agreement among the raters on whether a child has atypical autism or not is, however, very poor. We suggest that κ values greater than .50 are quite good, particularly given the very unequal base rates of autism versus the other diagnoses. It is well known that it is difficult to observe high κ values if there is a very uneven distribution of base rates (Walter and Irwig, 1988). This makes the difference in κ values between AsD and atypical autism even more striking considering the similar prevalence rates.

There may be several reasons for the poor reliability of the criteria for atypical autism. The *DSM-IV* criteria are rather vague; a child does not meet the criteria for autism in at least one of the three domains or has a different age at onset. It was very difficult for the three raters to decide whether or not the criteria for a particular domain were met if the number of symptoms was near the threshold value. Usually, the discussion of disagreement focused on whether the number or type of symptoms was inconsistent with the child's developmental level as estimated by chronological or mental age (no children had an atypical age at onset). This influenced whether the behavior qualified as a true PDD symptom or was simply a manifestation of developmental delay. It was also difficult to know how to classify older children who had previously met criteria for autism but had improved to such a degree that it was unclear how they should be currently classified. Some raters gave a diagnosis of atypical autism in this circumstance even when the earlier history suggested autism. Occasionally, the clinical notes disagreed with the ADI-R, and much discussion then followed as to which information was more accurate. This situation arose most often when clinical notes available for the child at a young age were inconsistent with the historical data on the ADI-R, which also assesses the 4- through 5-year-old period.

In contrast, the delineation of AsD was much easier as the raters had only to decide whether a child with PDD showed an "absence of clinically significant cognitive and language delay." While there was occasional debate about how to operationalize this criterion in a particular child, most of the time information was unambiguous. More problematic were cases in which there was no delay in language development but the child showed language "deviance," e.g., delayed echolalia, pronoun reversal, neologisms, etc. It must be remembered, however, that the *DSM-IV* criteria for AsD were modified in this study so that a diagnosis of autism did not take precedence over a diagnosis of AsD. No doubt this had an impact on the results as the number of children with autism in the sample was thereby reduced, allowing for greater variance, greater opportunity for disagreement and so increasing the potential for agreement beyond chance.

The results with respect to accuracy parallel findings on reliability. The clinician and the CBE showed excellent agreement on a diagnosis of non-PDD, good

agreement on a diagnosis of autism and AsD, but very poor agreement on a diagnosis of atypical autism. In the LCA, the three raters were able to differentiate autistic from non-PDD children and autistic from AsD children with very good accuracy (i.e., the false-positive and false-negative error rates were very low). However, the error rates involved in differentiating children with autism from children with atypical autism were much larger. Here the problem was missing "true" cases of atypical autism. The raters tended to miss an average of 49% of "true" cases of atypical autism, presumably because of the novelty of the criteria and inexperience with how to operationalize them most accurately. Thus even though the criteria for a diagnosis of atypical autism seem clear, operationalizing these criteria is very difficult. We conclude that the *DSM-IV* criteria for atypical autism are too vague to be used reliably and accurately. More specific criteria are needed to make operationalizing the construct easier. In particular, perhaps an impairment in reciprocal social interaction should be a necessary criterion, and the requirement that the PDD symptoms be out of context of the child's developmental level should be waived for a diagnosis of atypical autism.

The study design used here has several advantages over previous analyses of reliability and accuracy of diagnosis in children with PDD (Szatmari, 1992). A large sample size was available, including children with non-PDD diagnoses for which differential diagnosis is most often difficult. Care was taken to assemble a large amount of data using both information used in clinical practice as well as standardized instruments with good reliability. Finally, by assessing reliability and accuracy in several ways, we were able to eliminate the impact of information variance, nonblind clinical judgments, and sample selection procedures that might influence agreement estimates.

There are also some limitations to the potential generalizability of our findings. First, we did not have any subjects with disintegrative or Rett's disorder. It is possible that the existing criteria reliably differentiate these subtypes and, in the latter case, they most likely do. Second, our objective was to assess the *DSM-IV* criteria for PDD rather than the research criteria of *ICD-10*, which are very similar but use slightly different wording. In any case, the way the *DSM-IV* criteria for atypical autism were operationalized by the three raters was virtually identical with the *ICD-10* research criteria for this disorder. Third, it is also likely that we would have obtained different results if we had followed the *DSM-IV* hierarchy rule with respect to a child meeting the criteria for both autism and AsD. Based on previous results, virtually all children with AsD would meet criteria for autism. This would mean that the only relevant differentiation would be between autism and atypical autism. We did additional analyses collapsing the groups of AsD and autistic children, but we still found very poor reliability and accuracy in differentiating this new "autism" group from atypical autism. Fourth, it is important to remember that this was not a representative sample of children with PDD but a sample from a study of the genetics of the disorder. If multiple-incidence families are systematically different from single-incidence cases (although we have no reason to believe they are), the results may not generalize to the usual clinical situation.

Precision in the classification of PDD subtype is important only if these distinctions carry implications with respect to etiology, outcome, and response to treatment. Several recent reviews have concluded that genetic factors play an important role in the etiology of autism. Both family and twin studies have shown that relatives of autistic probands may have atypical autism or AsD (Bailey et al., 1995; MacLean et al., unpublished). This suggests that the genes for autism may confer susceptibility to these other forms of PDD as well. The key assumption in this context is that the clinical differentiation of autism from these other subtypes can be accomplished without measurement error. If the classification system is not reliable or accurate, some children with true autism might be classified as having atypical autism. Thus, the observation that atypical autism clusters in the families of autistic children could be due largely to misclassification and measurement error. This is likely true as well for the assessment of the "broader autism phenotype," which is virtually indistinguishable from atypical autism and AsD (Bolton et al., 1994).

Clinical Implications

Our findings also have several clinical implications. The data suggest that the diagnosis of atypical autism by a single clinician is of questionable value, whether for research or clinical purposes. The estimates of conditional probabilities indicate that it is very unlikely for a child who receives a diagnosis of atypical autism by

one clinician to receive the same diagnosis from another. This has important implications for clinicians and parents seeking a second opinion. Moreover, assigning a different prognosis to children with autism than to those with atypical autism does not appear warranted. Indeed, much of the literature on children with atypical autism (Szatmari, 1992) may more readily apply to high-functioning children with autism and those with AsD. Finally, it was encouraging to note that the modified criteria for AsD used in this study appear to be clinically useful in terms of their measurement properties.

In conclusion, we found that *DSM-IV* criteria were quite reliable in differentiating PDD from non-PDD children and, within the PDD spectrum, for the identification of children with autism and AsD. In addition, accuracy was also variable depending on PDD subtype. The psychometric properties of the *DSM-IV* criteria for atypical autism appear too poor to be used either for research or clinical purposes. If it is important to differentiate PDD subtypes (and there is no evidence yet that it is), much more work needs to be done on refining the *DSM-IV* criteria for atypical autism.

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

STATE OF WASHINGTON, Plaintiff, v. ALEXANDER NAM RIOFTA, Defendant.	NO. 00 1 00511 5 DECLARATION OF COUNSEL LINDA R. SULLIVAN

I, Linda R. Sullivan, do state:

1. I am an attorney at law, licensed to practice before this Court, and I represented Alex Riofta on a possession of stolen property charge which was ~~pending at the same time as~~ resolved approximately 2 weeks prior to his arraignment on (IRS) the first-degree assault charge in the above-entitled case.

2. I recall that when I met with Alex Riofta in the jail, it looked to me as if it hurt his head to think.

3. Our conversations were always disjointed.

Appendix 2

LAW OFFICES OF
SHERYL GORDON McCLOUD
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SEATTLE, WASHINGTON 98101-3052

4. I was fortunate enough to settle the felony charge on which I was representing him for a much more minor misdemeanor.

5. If I had not been able to achieve that settlement, I would have considered moving the Court for an order providing funds for a psychological evaluation for Mr. Richardson. I would have Linda Sullivan mine if there were any psychological defenses or mitigating factors.

6. I would have done this because his behavior and speech patterns raised substantial questions in my mind about whether he could have assisted me in the defense of a trial on a felony charge.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

4.11.01 Tacoma, WA
Date and Place

Linda R. Sullivan
Linda R. Sullivan, Declarant

LAW OFFICES OF
SHERYL GORDON McCLOUD
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the ____ day of _____, 2001, a copy of the foregoing DECLARATION OF COUNSEL LINDA R. SULLIVAN was served upon the following individuals by depositing same in the United States mail, first-class, postage prepaid, addressed to:

John W. Ladenburg
Prosecuting Attorney for Pierce County
Lisa Wagner
Deputy Prosecuting Attorney
Office of the Prosecuting Attorney
9032 Tacoma Avenue South, Room 946
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_____
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March 26, 2001

Ms. Sheryl Gordon McCloud
1201 3rd Avenue, Suite 3200
Seattle, WA 98101-3052

Re: State v. Alexander Nam Riofta

Dear Ms. McCloud:

This letter constitutes the report that you requested.

As you know, I am an expert in human perception and memory. I have been working in this field for approximately 35 years. I have approximately 100 publications; my research has been supported by federal grants for the past 28 years; I have been the editor of, or on editorial boards of numerous professional journals. I have testified as an expert witness approximately 125 times in Superior Court in 9 states, Federal Court in 6 cities, and U.S. Military Court in Sigonella, Italy.

You asked me to review various case materials—police reports, witness statements, and both pre-trial and trial testimony—in the case of State v. Alexander Nam Riofta. Also at your request, I visited the crime scene exactly a year following the shooting in question.

It is my opinion that an expert witness in human perception and memory could have aided considerably in Mr. Riofta's defense, and that absent such an expert, the reliability of the fact-finder's conclusion is seriously undermined. I believe that Mr. Riofta's attorney was aware of many of the relevant facts, but that a perception and memory expert would have been in a better position to tie all the facts together into one coherent picture that would have greatly assisted the jury in coming to its decision. In other words, such an expert could have provided the jury with an understanding of how perception and memory work, not available to their common sense, that would have been very helpful to them.

In what follows, I will describe what the relevant issues appear to be. In conjunction with this description, I will sketch the kinds of information that I would have provided to a jury had I been asked to testify in Mr. Riofta's behalf. I will first provide some general comments about the role of an eyewitness expert in a case such as this one, and then I will provide a brief description of how memory works. Finally, I will go through the memory factors that appear to be relevant in this case. An understanding of these factors along with the processes by which they interact with one another to eventually underlie a witness's report, all constitute pieces of a complex picture. These pieces must be carefully assembled for the jurors are to understand how to appropriately evaluate Mr. Sok's recollections of what happened on the morning of the shootings and in particular of who the shooter was.

The bulk of the remainder of this report is divided into four sections. In the first section, I will make some general introductory comments that are relevant to expert testimony in eyewitness identification cases, while the second, third, and fourth sections relate to the specific facts of this case. In the second section, I will describe issues that are relevant to Mr. Sok's abilities to form an initial memory representation of shooter. In the third section, I will comment on reasons why Mr. Sok recollected Mr. Riofta as the shooter even if Mr. Riofta was not, in fact, the shooter. Finally, in the fourth section, I will talk about how Mr. Sok' original, almost certainly poor memories of the shooter's appearance became reconstructed into strong, confidence-evoking memories of Mr. Riofta.

General comments

I will first describe the basic role of an eyewitness expert, and then I will go on to briefly sketch how memory works and how it is studied scientifically.

The Role of an Eyewitness Expert

Contrary to common sense, a confident witness need not be an accurate witness. Although in normal everyday life, high confidence is often predictive of high accuracy, a great deal of scientific research has delineated the circumstances in which—contrary to intuition—this normal predictive power vanishes. Such circumstances include (1) an original event (e.g., being shot at) that does not lend itself to a witness's being able to easily form an accurate memory of an assailant's appearance (e.g., because of lack of viewing time, restricted viewing, or lack of attention), along with (2) some form of suggestive post-event information that would bias the witness to reconstruct his memory in some fashion (e.g., seeing a biased lineup). Under such circumstances, the witness is inclined to rehearse this reconstructed memory of the original event (the shooting in this case) such that the memory becomes strong and confidence-inducing. Accordingly, although nonintuitively, the witness's confident identification at trial is based not, as the witness believes, on original and probably accurate information about the shooter's appearance acquired at the time of the original crime, but on potentially inaccurate, post-event information acquired at various times subsequent to the shooting.

While this combination of circumstances is rare in most peoples' experience, it is relatively common in crimes such as the shooting that is the focus of this case. It is also clear, based both on common sense and on confirming laboratory studies, that a highly confident eyewitness can be quite persuasive to a jury. Accordingly I view the main purpose of an eyewitness testimony expert as describing to the jury these scientifically understood circumstances under which confidence should be not be taken as a predictor of accuracy. Concomitantly I view the job of the defense attorney as one of demonstrating to the jury—either via hypothetical questions to the expert, or in closing arguments—that the facts of this case mirror these circumstances. This combination of information allows the jury to consider in a reasonably informed fashion the implications of the confidence that Mr. Sok displayed in his in-court identification of Mr. Riofta.

How Memory Works

It is important that a jury has an overview, even if a sketchy one, of how memory works and how it is studied scientifically. Such an overview provides a basis for understanding the relevance of information to follow.

There is a generally accepted theory about how memory works, which was first explained in detail in a classic book by Neisser (1967). This theory is rather complex, and has formed the foundation for an enormous amount of research activity during the intervening three decades. But the basic tenets of the theory are as follows.

First, memory does not work like a video recorder. Instead, when a person witnesses some complex event, such as a crime, or an accident, or a wedding, or a basketball game, he or she acquires *fragments* of information from the environment. These fragments are then *integrated* with other information from other sources. Examples of such sources are: prior expectations, information previously stored in memory, and information acquired after the event has occurred. The result of this amalgamation of information is the person's memory for the event. Sometimes this memory is accurate, and other times it is inaccurate.

An initial memory of some event, once formed, is not "cast in concrete." Rather, a memory is a highly fluid entity that changes, sometimes dramatically, with the passage of time. Every time a witness thinks about some event—revisits his or her memory of it—the memory changes in some fashion. Such changes take many forms. For instance, a witness can make inferences about how things probably happened, and these inferences become part of the memory. New information that is consistent with the witness's beliefs about what must have happened can be integrated into the memory. Details that do not seem to fit a coherent story of what happened can be stripped away. In short, the memory possessed by the witness at some later point (e.g., when the witness testifies in court) can be quite different from the memory that the witness originally formed at the time of the event.

The study of memory entails use of a variety of scientific techniques. A common technique is to try to identify circumstances under which memory is inaccurate vs circumstances under which memory is accurate. These efforts have revealed four major sets of circumstances under which memory tends to be inaccurate. The first two sets of circumstances involve what is happening at the time the to-be-remembered event is originally experienced, while the second two sets of circumstances involve things that happen after the event has ended.

The first set of circumstances involves the state of the *environment* at the time the event is experienced. Examples of poor environmental conditions include poor lighting, obscured vision, and short viewing duration. To the degree that environmental conditions are poor, relatively little information about the event will be stored in memory to begin with. This will ultimately result in a memory that is at best incomplete and, as will be described in more detail below, is at worst systematically distorted.

The second set of circumstances involves the state of the *observer* at the time the event is experienced. Examples of suboptimal observer states include high stress and diverted attention. As with poor environmental factors, this will ultimately result in a memory that is at best incomplete and, as will be described in more detail below, is at worst systematically distorted.

The third set of circumstances involves what occurs during the *retention interval* that intervenes between the to-be-remembered event and the time the person tries to remember aspects of the event. Examples of memory-distorting problems include a lengthy retention interval, which leads to forgetting, and inaccurate information learned by the person during the retention interval that can get incorporated into the person's memory for the original event.

The fourth set of circumstances involves errors introduced at the time of *retrieval*, i.e., at the time the person is trying to remember what he or she experienced. Such problems include biased tests and leading questions. They can lead to a biased report of the person's memory and can also potentially change and bias the memory itself.

Factors Influencing Mr. Sok's Original Perception of the Shooter

Three factors—low light levels, lack of attention to the shooter's appearance, and stress—almost certainly contributed to Mr. Sok's poor original perception of the shooter.

Light levels

The consequences of trying to remember a face (or anything else) seen in such dim or nighttime-lit circumstances are as follows.

First, and most importantly, if the lighting is sufficiently dim (as certainly appears to be true in the present case), there is an absolute limit on how much information can be acquired from the visual scene. This is because under sufficiently dim lighting conditions, acquisition of visual information is accomplished by a physiologically different visual system (the *scotopic system*) than is the case under normal lighting conditions, when visual information acquisition is under control of the *photopic system* (see, for example, Graham, 1989; Wandell, 1995). Unlike the photopic system, the scotopic system is (a) unable to perceive color and (b) is unable to resolve fine detail. This fact implies that Mr. Sok would have been unable to perceive the details of the shooter's face sufficiently to be able to identify him (or, more precisely, unable to distinguish the actual shooter from multiple potential shooters).

Second, when lighting comes only from artificial sources, the visual characteristics of the scene are quite different than they are under conditions of normal illumination. Under normal conditions, lighting is *diffuse*. That is, light from the main illumination source (usually, the sun) is scattered through the atmosphere and reflects off numerous objects in the environment. Hence the light reflecting off (say) a person's face that underlies a witness's perception of and eventual memory for that face comes from all directions. This causes a "soft" visual appearance; that is, all areas of the face are more or less uniformly illuminated and visible.

Under most outdoor artificial lighting conditions, lighting is not diffuse. Rather, light from specific sources (e.g., streetlights or headlamps) shine directly on the perceived object (e.g., the face). This gives rise to a "harsh" appearance; that is, some parts of the face are directly illuminated, whereas others are in complete shadow. This means that while some parts of the face are visible, other parts cannot be seen at all. If the only outdoor lighting comes from behind an assailant (from the witness's perspective) the light will tend to "blind" the witness and therefore, is worse than useless.

Third, under dim lighting conditions, information from the visual environment is acquired, if it can be acquired at all, more slowly than under normal lighting conditions.

Site visit

In the case at hand, it appeared from the original reports that the lighting level was poor; moreover, Mr. Sok reported it to be foggy (Trial testimony 181:9). To verify the lighting conditions, I drove to the shooting site on January 27, 2001, i.e., exactly one year following the date of the incident. I remained at the site for 20 min, from 06:35 to 06:45, thereby bracketing the reported time of the shooting, 06:45. My observations were these.

1. Lighting was minimal: Conditions were scotopic, as defined above.
2. There was a porch light on Mr. Sok's house, but the position of the shooter's car, as indicated on the drawing provided by Mr. Sok, was in shadow relative to it, i.e., not illuminated by the light.
3. The streetlight indicated in the interview drawing (east of the house, on the opposite side of street) was approximately 100 feet from the gate. This light would have backlit the shooter from the witness's perspective.

What can and cannot be perceived under low lighting conditions

It is important to emphasize that, under scotopic conditions, fine detail cannot be perceived and memorized, but gross detail *can* be perceived and memorized. For purposes of the present case, "gross detail" refers to general size, build, and hairstyle.

Mr. Sok's statement that he saw the shooter's face "clearly" (Trial testimony 189:17) cannot be correct if "clearly" is taken in its usual sense of being based on perception of fine facial detail. As will be discussed below it is entirely possible that at trial, Mr. Sok would have a *memory* of having seen the shooter's face clearly. However, it is almost certainly true that such a memory would have come about via after-the-fact memory reconstruction rather than having been based on Mr. Sok's original perception of the shooter.

Attention

To understand the relevance of attention, it is necessary to describe briefly what scientists mean by the term. To do so, it is useful to point out first that, during normal, everyday life, a person is usually engaged in trying to accomplish some task. The task might be as mundane as sharpening a pencil or as complex as performing brain surgery.

For any particular task, only a tiny subset of vast amount of information entering the sense organs from the environment is relevant to doing the task, while the vast majority is irrelevant to doing the task. This means that the brain needs some mechanism to eliminate, or filter out all the irrelevant information which could only have the effect of interfering with the task at hand. The sensory and perceptual systems of the brain have many such mechanisms, and attention may be thought of as the sum total of these mechanisms. Thus, attention allows the person to filter out irrelevant information, thereby allowing the person to focus on whatever small subset of environmental information is critical to accomplishing the task at hand. Metaphorically, it is useful to think of attention as like a spotlight that sweeps around a person's sensory environment. Whatever part of the sensory environment is illuminated by the spotlight is available to be perceived, processed, and perhaps remembered. Whatever is not illuminated by the spotlight does not get perceived, and cannot be remembered (e.g., Norman, 1976).

An enormous amount of scientific evidence shows that, a person can only remember what he or she attends to: that is, attention is necessary (although not sufficient) for remembering. There are two general circumstances under which people *fail* to attend to something.

First, when a person doesn't know that some particular thing is going to be important in the future, there's no particular reason to attend to it. The scientific evidence on this point is quite clear, and real-life examples abound as well. For example, people typically can't describe which letters go with which numbers on a telephone dial. Although they've seen thousands of telephone dials, their failure to attend to the letter-digit correspondence renders them unable to remember this correspondence if asked.

Second, attention is *limited*; that is, a person can only attend to one thing at a time. An analogy is often made to a narrow-beam spotlight: All that is illuminated by the spotlight is what falls into the spotlight's beam. This means that if the beam is illuminating one thing in the environment, it can't be illuminating anything else. In terms of remembering complex events, if there are several things happening at once, a person attending to one aspect of the scene cannot attend to any other aspects of the scene (e.g., Nelson & Loftus, 1980).

Given this state of affairs, a person must decide what to pay attention to. Generally, as indicated above, attention is allocated to whatever is most relevant to achieving the goal at

hand. For optimally remembering the appearance of something, such as a criminal's appearance, it is optimal to attend to whatever in the scene carries the most *information*. The term "information" has a precise, quantitative definition. In lay terms it means whatever is most *unusual*. If one is trying to remember a person, attention will be paid to whatever is the most unusual about the person. For example, if the person had a big scar on his forehead, that's what an observer would pay most attention to (e.g., Loftus & Mackworth, 1978).

Attention is relevant in the present case in two respects.

1. Lack of attention to the shooter's appearance prior to the time that Mr. Sok knew he was in danger

Prior to the time that Mr. Sok knew that he was being shot at, he had no reason to pay attention to the shooter.

2. Weapon Focus

Mr. Sok's transition to awareness that he was in danger occurred concurrently with his recognition that there was a potentially deadly weapon—a gun—in the scene that might be used in an effort to kill him. Accordingly, Mr. Sok's attention would shift at that point—not to the shooter's appearance, but rather to the gun itself. That this actually happened is indicated in the trial testimony (182:24 - 183:12; 201:19-25).

Scientific studies have shown that when there is a weapon in the scene, the weapon draws attention to itself, and away from other aspects of the scene—such as the appearance of the person who is wielding the weapon. This occurs for two reasons.

The first applies to laboratory experiments on memory: In general, as indicated earlier, when a witness is trying to remember something, he or she tends to perceive and remember whatever it is that a person is paying attention to, i.e., focusing on in the environment. From the perspective of most witnesses, a weapon is such an unusual feature. In general, therefore, when there is a weapon in the scene, witnesses are often able to describe the weapon quite well, but are less able to describe other aspects of the scene, such as the person holding the weapon.

The second reason applies to real-life situations, such as the one at issue here, where a person is actually being threatened by a weapon. As indicated earlier, attention is usually paid to those aspects of the environment that are most relevant to the task at hand. When a witness is being threatened with a weapon, the immediate task at hand becomes one of survival; hence the witness will, quite reasonably, attend to those aspects of the environment that are most relevant to survival, such as the weapon.

A relevant experiment was reported by Loftus, Loftus, & Messo (1987). In this experiment, people viewed a slide sequence depicting a person going through a cafeteria line. There were two versions of the slide sequence that were identical except that, in one of the slides, a person was holding a check in one version and a gun in the other version. During the viewing, we recorded where in the slide the viewer looked. After seeing the slides, viewers' memory was tested for details in the slide and for the face of the person who was holding the gun/check.

The results indicated that when there was a gun rather than a check, two things were true. First, people looked more at the gun than at the check, and second, people were able to remember less about scene details (including the face of the person holding the gun/check). These findings confirm the hypothesis that a weapon draws attention away from other aspects of the scene.

Stress/Fear

It appears from the case materials that Mr. Sok was under a great deal of stress at the time of the shooting, as would be entirely appropriate, since his life was in great danger (Trial testimony 183:6; 184:4). This means that scientific research on the effects of stress is relevant.

The relation between stress and mental functioning in general is described by an inverted U-shaped function of the amount of stress the person is undergoing. With either very low or very high stress, mental functioning—including ability to perceive and memorize—is not very good. It is at an intermediate stress level, that mental functioning is optimal.

Fear is a form of stress, so under conditions of great fear, mental functioning would be impaired.

Stress is an unusual topic of scientific investigation: it is difficult to study in the laboratory because of obvious ethical considerations. For this reason, I include in this report information about how stress can be scientifically studied. There are four major techniques for doing this.

The first technique is to use animals rather than humans. In many respects, animals are sufficiently like humans that conclusions made from animals will apply to humans. Indeed, the first studies that revealed the Yerkes-Dodson function used mice as subjects. Stress was defined as the degree of shock to which the mice were subjected and mental functioning (such as it is in mice) was defined to be the animals' ability to learn a maze (Yerkes & Dodson, 1908).

Second, stress can be studied with ordinary people (e.g., college students) under conditions that are not so stressful as to be unethical. These include manipulations such as showing violent slides or movies, or subjecting people to loud and unpleasant noise. In these studies, increasing stress is sometimes found to improve performance, and other times is found to impair performance. This is entirely understandable from the perspective of the Yerkes-Dodson function. If the general stress levels used are moderate, then in some experiments the overall stress level may be less than the optimal level, while in other experiments the overall stress level may be higher than the optimal level. In the former case, increasing stress would improve performance, while in the latter case, increasing stress would impair performance. This technique is *not* very good for studying effects of very high stress levels (e.g., Christianson, Loftus, Loftus, & Hoffman, 1991).

Third, about four decades ago, before ethical considerations were developed and enforced, the U.S. military did studies in which military personnel were put under conditions of high stress. For instance, in one study, they were on an airplane that they were told was going to crash. In this high-stress situation, mental functioning of various sorts showed substantial deterioration (Berkin. Boa;el. Kern, & Yagi, 1962).

Fourth, stress can be ethically studied in naturally-occurring stressful situations. For example, the British psychologist, Alan Baddeley has studied scuba divers and parachute jumpers in who voluntarily place themselves in circumstances of great stress. He finds that as stress level gets very high, mental functioning of various sorts begins to deteriorate, sometimes catastrophically so (e.g., Baddeley, 1972).

A final issue I wish to clarify relates to the common belief that under conditions of high stress, the details of an event are "stamped into" a person's memory. This experience seems superficially at odds with the assertion I have just made that high stress leads to poor memory. The resolution of this apparent discrepancy is as follows.

Under conditions of high stress, the *fact* that the stress-producing event itself occurred could well be stamped in; it's unlikely, for instance, that a person would forget that she was robbed. The reason for this is that stressful events are very *salient*, and people tend to rehearse salient events over and over in their minds. This causes the event to be stamped in.

However, this doesn't mean that the *details* of the event will be perceived and remembered correctly. Indeed, as I noted, under conditions of stress, details may very well be perceived incorrectly. This would mean, that the incorrectly perceived details could get rehearsed over and over along with the occurrence of the event itself, and memory for them would thus be very strong. This means that the person would be very confident in remembering the details even though they were incorrect. I will return later to the relation between confidence and accuracy.

Factors that May have Biased Mr. Sok's Identification of Mr. Riofta

The foregoing was meant to demonstrate that the memories of the shooter possessed by the three witnesses were probably quite poor. On what basis then did Mr. Sok identify Mr. Riofta? One possibility of course—that favored by the prosecution—is that Mr. Riofta was in fact the shooter and that, despite the extremely adverse circumstances, Mr. Sok was able to identify him at the time of the incident.

However, a careful reading of the case material appears to weigh against this possibility. To begin with, there is nothing in the report indicating any recognition of the shooter on Mr. Sok's part when the shooter first appeared—thereby suggesting that Mr. Sok did not in fact originally recognize the shooter at the time of the shooting. When the reporting officer, Officer Keen, took Mr. Sok's statement following the shooting, Mr. Sok reported that the shooter "looked like Alex", thereby indicating the tentativeness of Mr. Sok's very first identification of Mr. Riofta. Finally, in his interview some hours later with Detective Davidson, Mr. Sok reported that the shooter *was* Mr. Riofta, thereby indicating that, even in the absence of further evidence, Mr. Sok's confidence had increased that the shooter was in fact Mr. Riofta.

Note, incidentally, that, contrary to what is suggested by Mr. Sok's lack of recognition as indicated by his original description of the actual event, Mr. Sok claims at trial that he recognized him instantly (trial testimony, 182:2-3). This testimony from Mr. Sok, however sincere and honest, does not necessarily mean that Mr. Sok is correct: As will be discussed in more detail below, Mr. Sok may well have reconstructed his memory after the event, not only to include Mr. Riofta as the shooter, but also to include "immediate recognition" on his part.

Inferences

It appears that Mr. Sok inferred that the shooter was Mr. Riofta at some time after the actual shooting. It is not clear why Mr. Sok would have made this inference. Possibly Mr. Sok knew that Mr. Riofta was angry with members of Mr. Sok's family, and therefore made the after-the fact inference that Mr. Riofta was the shooter.

I should note that this argument rests on the presumption that indeed Mr. Sok did not infer the shooter to be Mr. Riofta until sometime after the shooting. This presumption is, as noted, strongly suggested by the original case material as we;; as by Officer Keen's trial testimony that Mr. Sok, in his initial statements said only that the shooter "looked like Alex". However, if this presumption is incorrect, Mr. Sok may still have inferred a shooter that he saw under low-light conditions, to be Mr. Riofta even it it was not but rather was someone who had the gross physical appearance of Mr. Riofta.

Of critical importance is that once Mr. Sok makes the inference that the shooter was Mr. Riofta, Mr. Sok will rehearse Mr. Riofta's appearance as part of his memory representation of the shooting which will—as the case material shows—lead to an increase over time in Mr. Sok's conviction that Mr. Riofta was the shooter. I will discuss this in more detail below under the heading of "post-event information."

Biased Photo Montage

The photo montage shown to Mr. Sok was not, of course, a normal photo montage. It was not constructed so as to contain six individuals who matched the description given to the police by Mr. Sok. Rather, it was a collection of people who had been previously booked and whose name was some variant of "Alex." Unsurprisingly, few of the photo-montage members aside from Mr. Riofta conformed to Mr. Sok's description of the shooter. Mr. Sok could therefore rule out most montage members immediately. Accordingly, the identification procedure was more like a showup than a lineup and a discussion of difficulties with showup procedures is appropriate (see Green & Swets, 1966, for technical foundations of this assertion, and Wells, 1993, for its application to eyewitness testimony).

A showup procedure has a good deal more potential to produce a misidentification that does a lineup procedure. In a properly done lineup procedure, a correct answer must be based on the witness's actual memory; if a particular person (the suspect) in the lineup has not been seen, it is unlikely that the person will be chosen.

However, in a showup procedure, the witness is at liberty to say yes or no independent of his or her memory. Accordingly, the witness's answer could be based on numerous factors apart from memory, such as the witness's general inclination to answer a question yes or no, the witness's expectations, and the pressure being put on the witness by others.

In the present instance, the only individual that the police showed to Mr. Sok who fits Mr. Sok's general memory of the shooter is Mr. Riofta[1]. Thus, given that Mr. Sok was inclined to identify anyone from the montage, Mr. Riofta would be the obvious candidate.

Reconstruction of Mr. Sok's Memories

In this section, I will link Mr. Sok's having a poor initial perception of the shooter, in conjunction with a potentially biased identification procedure, to his eventual confident identification of Mr. Riofta at trial.

Post-Event Information

As argued above, Mr. Sok appears to have inferred the shooter to be Mr. Riofta at some point following the shooting (rather than while he was in the shooter's presence). He then selected Mr. Riofta from the heavily biased "photo montage" at some point later on. Accordingly Mr. Riofta's appearance, both as a component of Mr. Sok's inferences and as part of the "photo montage" constituted a source of what is referred to as *post-event information*: Both of these representations of Mr. Riofta strongly suggested important information about the shooting, namely that the shooter's appearance was that of Mr. Riofta. This would have allowed Mr. Sok to reconstruct his memory such that his originally hazy memory of the actual shooter was replaced by a much stronger memory of Mr. Riofta.

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[1] As indicated earlier in this report, under the conditions of the shooting, Mr. Sok would not have been able to perceive or subsequently remember fine details of the shooter's appearance. However, he would have been able to perceive and subsequently remember enough about the shooter's gross features that he could have ruled out most members of the "photo montage."

Research on post-event information

Over the past twenty years, literally hundreds of scientific studies have been carried out demonstrating the force of post-event information and the circumstances under which it operates. The following is a summary of the relevant evidence.

Post event information may best be illustrated by describing a classic experiment, reported by Loftus and J. Palmer (1974). In this experiment, a group of subjects were shown a film of a car accident (one car running into another). After the film, the subjects were asked a series of questions about the accident that they had just seen. The subjects were divided into two subgroups that were treated identically except for a single word in one of the questions. In particular, the "bumped" group was asked the following question about speed: "How fast was the car going when it bumped into the other car?" The corresponding question asked to the "smashed" group was, "How fast was the car going when it smashed into the other car?" Other than that, the "bumped" and "smashed" groups were treated identically.

The first finding to emerge from this experiment was that the "smashed" group provided a higher speed estimate than the "bumped" group (roughly 40 mph vs 30 mph). More interesting, however, was that all subjects returned approximately a week later and were asked some additional questions about the accident. One of the questions was "Did you see any broken glass?" In fact, there had been no broken glass, so the correct answer to the question was "no." However, the subjects who had originally been asked about speed using the verb "smashed" were substantially more likely to incorrectly report the presence of broken glass than were subjects who had originally been asked about speed using the verb "bumped."

The interpretation of this finding is that the verb "smashed" constituted post-event information. Upon hearing this word, the subjects apparently reconstructed their memory for the accident in such a way as to be consistent with a violent accident in which two cars "smashed" into one another. Integration into their memory of the broken glass was one consequence of such reconstruction. That is how the non-existent broken glass appeared in those subjects' memories a week later.

Other research has shown that after integration of post-event information into the original memory takes place, it is generally not possible to disentangle which information came from the event itself, and which information was learned, and became integrated, later on.

It follows then that post-event information can systematically bias memory. To the degree that the post-event information is false (as in the Loftus and Palmer experiment) it would cause the ultimate memory to become more inaccurate.

Post-event information is most easily "injected" into memories that are incomplete to begin with. This is because the fewer the details resident in the original memory, the less likely it is that post-event information will conflict with something that already exists in memory. An incomplete memory could come about as a result of either little information being acquired about some culprit's appearance to begin with (e.g., due to some of the factors described above, such as lack of attention or lack of adequate time) and/or as a result of a great deal of time has elapsed between some original event and the time of test.

Present-case facts that are explainable on the basis of post-event information

There are three aspects of Mr. Sok's trial testimony that are inconsistent with his initial reports and/or physical facts, and/or common sense. They are as follows

1. Mr. Sok claimed to have seen the shooter's face "clearly" even though the lighting conditions which he described, and which I personally confirmed at the same place, date and time exactly one year later, was such that this was not possible (Trial testimony 189:17)
2. Mr. Sok claimed that he was in the shooter's presence for a couple of minutes (Trial testimony 202:18-25). No reasonable person would believe that the events described by Mr. Sok could have taken that long.
3. Mr. Sok claimed that he immediately recognized the shooter as being Mr. Riofta (Trial testimony 182:2-3) even though he described offering no signs of recognition, such as saying, "Hello" when asked for a cigarette.

All these anomalies are understandable if it is assumed that Mr. Sok constructed the details of his memory after the fact rather than while the shooting was occurring. This would have transpired as follows.

1. In inferring that the shooter was Mr. Riofta and reconstructing his memory accordingly, Mr. Sok would have ample opportunity to create a detailed and clear memory representation of Mr. Riofta.
2. In order to remember the shooter as clearly as he claimed to, Mr. Sok would have to have seen the shooter for a relatively long time, and would have reconstructed his memory of the event's duration accordingly.
3. Given that Mr. Sok had a clear memory of Mr. Riofta's appearance as the shooter, it is reasonable for him to further infer that his recognition of the shooter as Mr. Riofta occurred immediately (just as a person ordinarily recognizes the face of an acquaintance relatively quickly).

Confidence and Accuracy

As noted, Mr. Sok' confidence that Mr. Riofta was the shooter increased over time from showing no signs of recognition to reporting that "It looks like Alex" to "It *was* Alex." As I have noted, and will describe in greater detail below, contrary to what typical jurors believe, Mr. Sok's confidence in his identification does not necessarily mean that his identification is correct.

In conjunction with previous discussions in this document—particularly my initial discussion of my role as an expert, along with my discussion above of stress—I have already alluded to the relation between a person's confidence in some memory and the probability that the memory is accurate. It is worthwhile to be somewhat more specific here about scientific evidence involving this issue.

Some years ago, a study was done examining 45 experiments that had measured the relationship between confidence in some memory and the accuracy of that memory (Deffenbacher, 1980). In approximately half of those studies, there was the positive relation between confidence and accuracy that our intuitions would lead us to believe: that is, higher confidence was associated with higher accuracy. In the other half of the experiments, however, there was *no* relation (or, in some instances, even a negative relation) between confidence and accuracy.

Which result was found—that is, whether accuracy was or was not positively related to confidence—depended on the overall circumstances surrounding the formation of the memory. Favorable circumstances (e.g., good lighting, no stress, no post-event information, etc.) lead to the expected positive relation between confidence and accuracy. However, unfavorable circumstances lead to no relation, or a negative relation between confidence and accuracy.

The reason for this is that when circumstances are generally unfavorable, the original perception is poor, and the resulting memory is filled with gaps. Suppose, for example, that a person experiences a near-accident in a car (say is almost hit by another car). Because of the brevity and stress of the situation, the person probably would not remember many details—for example, he or she might not remember the make or color of the other car, or whether or not there was a passenger in the car. These would be *gaps* in the person's memory.

But because the event was salient, the person would rehearse the event in his or her mind. In the process of rehearsing, the memory gaps would tend to be filled in. Such filling in could be random, it could be due to expectations, it could be due to postevent information—it could be due to many things, few of them likely to be accurate. The resulting memory would therefore be generally inaccurate. But the rehearsal of this inaccurate memory would leads to a *strong* memory, in which the person would have relatively high confidence.

Conclusions

In conclusion, I reiterate that an eyewitness testimony expert would have been useful at Mr. Riofta's trial, and that, absent an eyewitness expert to provide the information described in this report to lay fact-findors, the reliability of their factual conclusions is severely undermined. In conjunction with the defense attorney, such an expert could have provided for the jury the information that I have included in this report. I have testified quite often in situations like this, and so have my colleagues. Accordingly, there is no doubt that an eyewitness expert would have easily been located.

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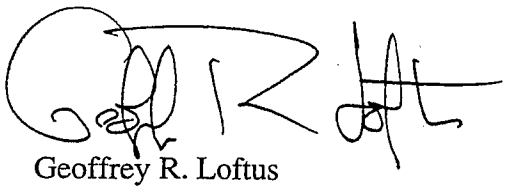
Sincerely,



Geoffrey R. Loftus
Professor

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

STATE OF WASHINGTON, Plaintiff, v. ALEXANDER NAM RIOFTA, Defendant.	NO. 00 1 00511 5 DECLARATION OF DR. LOFTUS

I, Geoffrey Loftus, do state:

1. I am a psychologist and a full professor in the Department of Psychology at the University of Washington, and I reviewed a variety of materials concerning the above-entitled case at the request of Mr. Riofta's lawyer, Sheryl Gordon McCloud.

2. The material contained in my letter-report to Ms. McCloud, dated March 26, 2001, is based upon my personal knowledge, my research, and my review of discovery,

Appendix 3(b)

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transcripts and pleadings from Mr. Riofta's case; my conclusions based upon those sources are true and correct.

I declare under penalty of perjury that the foregoing is true and correct.

Seattle WA
Date and Place

6/2009
Geoffrey Loftus, Declarant

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NOTE: UNPUBLISHED OPINION, SEE RCWA 2.06.040

Court of Appeals of Washington,
Division 2.
STATE of Washington, Respondent,
v.
Alexander Nam **RIOFTA,** Appellant.
No. 28209-7-II.

Sept. 2, 2003.

Appeal from Superior Court of Pierce County.

Sheryl Gordon McCloud, Attorney at Law, Seattle, WA, for Appellant.

John Christopher Hillman, Pierce County Prosecuting Attorney, Tacoma, WA, for Respondent.

UNPUBLISHED OPINION

MORGAN, J.

*1 Alexander Nam Riofta appeals his conviction of first-degree assault with a firearm enhancement. He claims (1) that his retained attorney was improperly disqualified; (2) that his speedy trial rights were violated; (3) that a photomontage was impermissibly suggestive; (4) that he was incompetent at the time of trial; and (5) that his counsel provided ineffective assistance. We affirm.

As teenagers, Ratthana Sok and Riofta played basketball at a local park. They were acquaintances rather than friends, but Sok knew Riofta as 'Alex.'

Around 6:40 a.m. on January 27, 2000, Sok left home to go to school. As he opened his garage door, he noticed a Honda Civic parked nearby. A male from the Honda approached, and Sok recognized him as Alex. Alex came within two or three feet, asked for a cigarette, then pulled a chrome revolver. He pointed the revolver at Sok's head and fired several times. He missed, and Sok fled into his house.

Officer Keen arrived within five minutes. Sok told him the shooter 'looked like Alex.' [FN1] Sok described Alex as five foot two, 125-130 pounds, 17- 18 years old, wearing a white cap. Keen observed two bullet holes around the garage door and three more in vehicles in the garage. Keen also found a white baseball hat on the sidewalk.

FN1. Report of Proceedings (RP) at 220.

Sok's mother told Keen that Sok's brother, Veasna, was a defendant in a case in which five people had been shot to death at the Trang Dai caf'. Veasna had agreed to testify for the State against a number of defendants, including Jimmie Chea, John Phet and Sarun Ngeth. Jimmie Chea's nickname was

'Cricket.'

Keen notified the lead detective in the Trang Dai case, Detective Davidson, who soon arrived and spoke with Sok. Sok said that 'the person that shot at him was someone he knew by the name of Alex. [FN2] Sok said Alex was 'a Cambodian male, 17 to 18 years of age, five-two to five-three, 125 to 130 pounds, with a shaved head and a moustache.' [FN3]

FN2. RP at 246.

FN3. RP at 246.

Davidson and Sok went to the police station, where Davidson used a computer program to select pictures of possible perpetrators. Searching first for Asian males with the name 'Alex,' he came up with pictures of several men, none of whom Sok identified. Searching next for Asian males with the name 'Alexander,' he came up with seven more men, one of whom was Riofta. When Sok saw Riofta's picture, he said, 'That's him right there, I'm positive.' [FN4]

FN4. RP at 249.

The next day, Davidson went to Riofta's house and arrested him. During the arrest, Riofta yelled angrily, 'I didn't shoot no mother fucker yesterday. I was here drinking all night. I worked yesterday from--at The News Tribune from 1:00 to 5:30. I don't even own no gun, how could I shoot some mother fucker?' [FN5]

FN5. RP at 251.

At the police station, Riofta made several more statements to Davidson. He said, 'If I had shot at someone, I would kill them. I am not stupid enough to get identified.' [FN6] He admitted knowing Chea and Ngeth, two of the Trang Dai defendants. He admitted visiting the Sok residence on a previous occasion to see Veasna. He manifested hostility toward Veasna, stating that 'Veasna was a sucker for snitching on the Homeys, and that he deserved to get choked up in court for snitching on Cricket.' [FN7] He said that he used to 'hang out with {Ngeth}, but that he quit hanging out with him because he had a reputation for shooting people.' [FN8] He said he had a newspaper article about all the 'Homeys' [FN9], and the police later found that article at his residence.

FN6. RP at 254.

FN7. RP at 255. Veasna had recently been assaulted in the courtroom by Chea and Phet.

FN8. RP at 256.

FN9. RP at 257.

*2 On January 31, 2000, Riofta was charged with first degree assault with a firearm. He retained the Law Offices of Monte Hester (specifically, attorneys Brett Purtzer and Lance Hester) and was arraigned the same day.

On February 23, 2000, the prosecutor moved to disqualify Hester's firm, claiming that its members had a potential conflict of interest because Purtzer was already representing Sarun Ngeth. The prosecutor intended to show that Riofta's motive for shooting at Sok had been to intimidate Veasna from testifying against the other Trang Dai defendants, one of whom was Ngeth. The prosecutor thought that if the State made an offer to Riofta 'regarding information relating to Trang Dai, Mr. Purtzer would not be able to take this information to defendant Riofta without putting defendant Ngeth in jeopardy {,}' and that Ngeth would make 'a subsequent claim ... of a{n} actual conflict {.}' [FN10]

FN10. Clerk's Papers (CP) at 9.

On March 3, 2000, Purtzer claimed that he could represent both Riofta and Ngeth without a conflict of interest. He explained that Chea and Phet, but not Ngeth, had been charged with intimidation of a witness for assaulting Veasna after the latter had agreed to be a State's witness. The new intimidation incident would be admissible in the Trang Dai trial of Chea and Phet, but not in the Trang Dai trial of Ngeth, and for that reason the trial court had ordered that the Trang Dai charges against Chea and Phet be tried separately from the Trang Dai charges against Ngeth. Purtzer concluded that 'the potential for a conflict in this case is based on pure speculation.' [FN11]

FN11. CP at 25.

On March 3, 2000, the trial court granted the State's motion to disqualify. It reasoned:

> {I}t's an unusual circumstance in terms of the Trang Dai case. I wouldn't do this just on any case, but I think that that case is so long and ongoing, and the fact that this particular defendant ... made statements that {Veasna} deserved to be assaulted by the other {Trang Dai} defendants leads me to think there certainly is a potential that he could be a witness at some point, or down the road, there's potential for real conflict. [FN12]

FN12. RP (3/3/2000) at 12; see also CP at 27.

On March 15, 2000, the trial court appointed attorney Lloyde Alton to represent Riofta. On March 23 Riofta waived speedy trial and asked for a continuance, which the trial court granted.

On April 17, 2000, attorney Zenon Olbertz was substituted for Alton. Riofta waived speedy trial and asked for a continuance. The trial court set trial for June 19.

On June 14, 2000, Riofta moved to suppress Sok's identification of Riofta from the photomontage. Riofta claimed that he was the only one who fit Sok's description and the only one with a shaved head; everyone else had 'observably long hair.' [FN13] The trial court denied the motion.

FN13. CP at 74.

On June 19, 2000, the scheduled trial date, Olbertz withdrew because Riofta had retained attorney George Beckingham. The trial court granted Riofta's motion for a continuance so Beckingham could prepare. Riofta waived speedy trial, and the court reset trial for August 14, 2000.

*3 On August 14, 2000, Beckingham failed to appear. The prosecutor explained in a fax dated August 7 that Beckingham had said he was living in Las Vegas and 'did not plan on flying back to Tacoma for trial on the 14th until such time as we were actually assigned a courtroom.' [FN14] Based on Beckingham's absence and the unavailability of a courtroom, the court reset trial for August 16. Riofta did not waive speedy trial.

FN14. CP at 88.

On August 16, 2000, Beckingham again did not show up. The court reset trial for August 21 and assigned a specific courtroom. Riofta did not waive speedy trial.

On August 21, 2000, Beckingham again did not show up, and the court reset trial to August 23. Riofta did not waive speedy trial.

On August 23, 2000, Beckingham again did not show up, and the State moved to remove him as counsel. The court granted the motion and appointed attorney Allen Walker. Walker asked for time to prepare, which the court granted over Riofta's objection. The court reset trial for October 23.

On October 23, 2000, the State requested a continuance because two of its witnesses, a police officer and a merchant seaman, were not available. The State had subpoenaed the seaman for the June 19 trial date, attempted to serve another subpoena for October 23 and personally contacted him to determine his availability on October 23. Noting that Saleh had been personally served for the June 19 trial date, the court found good cause to continue the trial until November 27, 2000. Riofta did not waive speedy trial.

On November 28 trial began. Sok identified Riofta as the shooter. Riofta called himself, his mother, and his sister's boyfriend. On November 30, 2000, the jury found Riofta guilty of first-degree assault while armed with a deadly weapon.

On December 12, 2000, Walker withdrew because Riofta had hired another private attorney, Sheryl Gordon McCloud.

On April 26, 2001, Riofta moved to vacate his conviction pursuant to CrR 7.8. He asserted that he had been incompetent at the time of trial and that his trial attorney had rendered ineffective assistance by not obtaining a mental health evaluation and an eyewitness expert.

To support his motion to vacate, Riofta submitted a psychiatric report by Dr. Robert Olsen, M.D. After evaluating Riofta at McCloud's request, Dr. Olson had concluded that Riofta 'suffers from a severe psychiatric and neurologic defect that has and will continue to impair him into the indefinite future.' Dr. Olson did not opine that Riofta was incompetent

at the time of trial.

To further support his motion to vacate, Riofta submitted declarations from three of his former attorneys and a report from Geoffrey Loftus, an 'expert in human perception and memory.' [FN15] According to each of the attorneys, he or she had been concerned about competency and would have obtained a mental health evaluation if he or she had remained in the case. According to Loftus, 'an expert witness in human perception and memory could have aided considerably in Mr. Riofta's defense, and that absent such an expert, the reliability of the fact-finder's conclusion is seriously undermined.' [FN16]

FN15. CP at 278-90.

FN16. CP at 278.

*4 On June 12, 2001, the trial court granted Riofta's motion that he be examined at Western State Hospital. After evaluating Riofta, Dr. Thomas Danner, Ph.D., and Dr. Hart reported that 'this individual does not have the capacity at this time to understand fully the nature of the legal proceedings against him or to assist in his own defense.' [FN17]

FN17. CP at 395 (emphasis added).

On August 1, 2001, the trial court granted the State's motion to commit Riofta to Western State Hospital to evaluate whether he was competent at the time of trial and until his present competency was restored. After further evaluating Riofta, Dr. Danner opined that Riofta suffered from bipolar and antisocial personality disorders; that it was not possible to determine whether Riofta had been incompetent at the earlier trial; and that Riofta was presently competent. With respect to incompetency at the earlier trial, Dr. Danner stated:

> While it is not possible to describe his level of competency on his previous trial, ... the defendant was aware of or able to recall the trial. As indicated above, he was aware of the length of time the jury was out and that he believed that he should have objected more. Mr. Riofta said that when he wanted to object, his attorney asked him, 'Where is the proof?' stating that there was no contrary proof or evidence. As Mr. Riofta appears to have been aware of the process and involved during his trial, though it is impossible without other information to speak with certainty as to his level of competency. [FN18]

FN18. CP at 407 (emphasis added).

With respect to present competency, Dr. Danner stated that Riofta 'has the capacity to understand the nature of the legal proceeding against him and to participate in the next stage of his trial.' [FN19]

FN19. CP at 408.

On December 14, 2001, the trial court held a hearing on Riofta's motion to vacate. Attorney Walker testified that while he was representing Riofta, he believed Riofta understood the nature of the charges and the role of counsel. They had discussed the charged events, legal theories, the potential for plea bargaining, witnesses, and discovery materials, and Walker had not formed 'any concerns about {Riofta's} ability to understand what was going on {.}' [FN20] Walker testified that he had not obtained an expert on eyewitness identification for two reasons: (1) because Sok was previously acquainted with Riofta; and (2) because if he did, the State would also, thus placing Riofta in a 'worse position.' [FN21] The trial court denied the motion to vacate, ruling that Riofta had been competent at trial and that Walker had provided effective assistance.

FN20. RP at 410.

FN21. RP at 413-14.

On December 14, 2001, the trial court imposed an exceptional sentence downward of 70 months, [FN22] plus 60 months for the mandatory firearm enhancement. Riofta then filed this appeal, in which the issues are (1) the disqualification of Purtzer and Hester; (2) the right to speedy trial; (3) Sok's identification from the photo montage; (4) Riofta's competency; and (5) Walker's effectiveness.

FN22. The standard range was 93-123 months.

I.

*5 The first issue is whether the trial court violated Riofta's right to retain an attorney of his choice when it disqualified Purtzer and Hester due to a conflict of interest. The Sixth Amendment provides

that '{i}n all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defense.' This provision includes the right to retain an attorney of one's choice [FN23] and also to have an attorney who is 'free from conflicts of interest.' [FN24]

FN23. *Wheat v. United States,* 486 U.S. 153, 159, 108 S.Ct. 1692, 100 L.Ed.2d 140 (1988); *State v. Chase,* 59 Wn.App. 501, 506, 799 P.2d 272 (1990).

FN24. *State v. White,* 80 Wn.App. 406, 410, 907 P.2d 310 (1995), *review denied,* 129 Wn.2d 1012 (1996) (citations omitted).

Recognizing that these rights cannot always be harmonized, the United States Supreme Court has said that the Sixth Amendment's essential aim 'is to guarantee an effective advocate for each criminal defendant rather than to ensure that a defendant will inexorably be represented by the lawyer whom he prefers.' [FN25] Thus, a trial court sometimes may circumscribe the 'right to choose one's own counsel,' [FN26] based on its 'evaluation of the facts and circumstances' and 'informed judgment.' [FN27] Although a trial court 'must recognize a presumption in favor of petitioner's counsel of choice ..., that presumption may be overcome not only by a demonstration of actual conflict but by a showing of a serious potential for conflict.' [FN28]

FN25. *Wheat,* 486 U.S. at 159.

FN26. *Wheat,* 486 U.S. at 159.

FN27. *Wheat,* 486 U.S. at 164.

FN28. *Wheat,* 486 U.S. at 164.

Turning to this case, we first address whether defense counsel had an actual conflict of interest. Defense counsel has such a conflict when he or she 'owes duties to a party whose interests are adverse to those of the defendant.' [FN29] When the trial court ruled, Riofta had not been named as a witness in the Trang Dai case, and Ngeth was not known to have been involved in Riofta's case. Nothing in the record shows that defense counsel had an actual conflict of interest.

FN29. *White,* 80 Wn.App. at 411-12.

We next address whether there was a serious potential for defense counsel to have a conflict of interest. The Trang Dai case was an ongoing, complicated, multi-party matter. The trial court knew that Riofta used to 'hang out' with Ngeth. It also knew that Riofta had told the police that the victim's brother, Veasna Sok, deserved to be assaulted by the other Trang Dai defendants. The court knew that the police had searched Riofta's house and found a newspaper article with pictures of all the Trang Dai defendants. The prosecutor was saying that he intended to extend a plea offer in the hope of turning Riofta against the other Trang Dai defendants, including Ngeth. If Riofta were faced with such an offer, his interests would conflict with the interests of the other Trang Dai defendants, including Purtzer's client Ngeth. As neither Riofta nor Ngeth had offered to waive a conflict if one arose, [FN30] the trial court was being asked to predict the future without benefit of the hindsight that we presently enjoy. [FN31] Although a trial court should be very slow to disqualify counsel whom a defendant has chosen to retain, we cannot say that the trial court abused its discretion in this case.

FN30. 'Trial courts may allow an attorney to proceed despite a conflict 'if the defendant makes a voluntary, knowing, and intelligent waiver.'' *State v. Dhaliwal,* 113 Wn.App. 226, 232, 53 P.3d 65 (2002) , (citing *Garcia v. Bunnell,* 33 F.3d 1193, 1195 (9th Cir.1994)), *review granted,* 148 Wn.2d 1009 (2003) As the text indicates, however, Riofta was not offering a waiver from himself or Ngeth.

FN31. As the Wheat court aptly noted, a trial court ... must pass on the issue of whether or not to allow a waiver of a conflict of interest by a criminal defendant not with the wisdom of hindsight after the trial has taken place, but in the murkier pre-trial context when relationships between parties are seen through a glass, darkly. The likelihood and dimensions of nascent conflicts of interest are notoriously hard to predict, even for those thoroughly familiar with criminal trials. 486 U.S. at 162-63.

II.

The next issue is whether the trial court failed to observe Riofta's right to speedy trial. Although a defendant not released from jail pending trial 'shall

be brought to trial not later than 60 days after the date of arraignment,' [FN32] a trial court may grant a continuance 'when required in the administration of justice and the defendant will not be substantially prejudiced in the presentation of the defense.' [FN33] A properly granted continuance tolls the speedy trial period. [FN34]

FN32. CrR 3.3(c)(1).

FN33. CrR 3.3(h)(2); *State v. Thomas,* 95 Wn.App. 730, 737-38, 976 P.2d 1264 (1999), *review denied,* 139 Wn.2d 1017 (2000) (consent or waiver not required).

FN34. CrR 3.3(g)(3).

***6** As Riofta acknowledges, he cannot now rely on continuances to which he did not object. He objected, however, to the four continuances in August when Beckingham failed to appear, and also to the continuance on October 23.

We turn to the four August continuances. As just indicated, they were granted because Beckingham, Riofta's privately retained attorney, failed to appear for trial. Each time, the court determined that a continuance was required 'in the due administration of justice and the defendant {would} not be substantially prejudiced in the presentation of {his} defense.' [FN35] These determinations were obviously within the trial court's discretion, for to rule otherwise would forced Riofta to stand trial without counsel.

FN35. CP at 79, 80, 82.

The continuance on October 23 was granted in part because a State's witness was unavailable due to his employment as a merchant seaman. [FN36] The State had subpoenaed this witness for a trial date on which Beckingham had failed to appear. [FN37] It had personally contacted the witness, and tried to serve him again, for the October 23 trial date. Under all the circumstances, including the delays caused by Riofta's decisions to change counsel and his counsel's decisions not to appear, the trial court did not abuse its discretion by finding that the 'administration of justice' required an additional continuance so that the witness could appear.

FN36. See *State v. Nguyen,* 68 Wn.App. 906, 914, 847 P.2d 936 ('The unavailability of a material state witness is a valid ground for continuing a criminal trial where there is a valid reason for the unavailability, the witness will become available within a reasonable time, and there is no substantial prejudice to the defendant.'), *review denied,* 122 Wn.2d 1008 (1993); see also *State v. Torres,* 111 Wn.App. 323, 44 P.3d 903 (2002), *review denied,* 148 Wn.2d 1005 (2003).

FN37. See *State v. Tatum,* 74 Wn.App. 81, 85-86, 871 P.2d 1123 (subpoena imposes 'a continuing obligation to appear until discharged by the court or the summoning party'; 'to require issuance of a new subpoena upon the setting of each new trial date would place an unnecessary burden on the courts, the parties, and those subpoenaed to appear as witnesses.'), *review denied,* 125 Wn.2d 1002 (1994).

III.

The next issue is whether the trial court should have excluded Sok's photographic identification of Riofta. An out-of-court identification 'violates due process if it is 'so impermissibly suggestive as to give rise to a substantial likelihood of irreparable misidentification.'' [FN38] Here then, Riofta must show that (1) the photographic identification procedure was impermissibly suggestive; and, if it was, (2) that under the totality of circumstances, the suggestiveness created a substantial likelihood of irreparable misidentification.

FN38. *State v. Vickers,* 148 Wn.2d 91, 118, 59 P.3d 58 (2002) (footnote omitted).

Riofta claims that the montage 'contained men whose appearances differed dramatically from {his}.' [FN39] As a result, he says, it was suggestive.

FN39. Br. of Appellant at 34.

It is difficult to review this claim because our record contains such poor copies of the pictures used in the montage. As far as we can tell, however, Riofta was the only person with a shaved head.

Assuming without holding that the montage was suggestive, it did not 'give rise to a substantial likelihood of irreparable misidentification.' [FN40] Relevant factors include the witness's 'opportunity

to view the suspect, the degree of attention, the accuracy of the witness's prior description, the level of certainty demonstrated at the identification, and the time span of the identification.' [FN41] Sok saw the shooter approach and immediately recognized him as 'Alex.' Sok was acquainted with 'Alex' from the playground and because Alex had visited Veasna at the Sok home. Sok gave the police a detailed description that closely matched Riofta's appearance:

FN40. *Vickers,* 148 Wn.2d at 118.

FN41. *State v. Booth,* 36 Wn.App. 66, 70, 671 P.2d 1218 (1983) (citing *Neil v. Biggers,* 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972)); *State v. Burrell,* 28 Wn.App. 606, 610, 625 P.2d 726 (1981)

*7 'Cambodian male, 17 to 18 years of age, five-two to five-three, 125 to 130 pounds, with a shaved head and a moustache.' [FN42] When Sok saw Riofta's picture, he blurted, 'That's him right there, I'm positive.' [FN43] In light of these circumstances, the record does not show a substantial likelihood of irreparable misidentification.

FN42. RP at 246.

FN43. RP at 249.

IV.

The next issue concerns Riofta's competency to stand trial. Riofta argues (A) that he was denied his right to a competency hearing, and (B) that he was incompetent at trial. RCW 10.77.050 provides that '{n}o incompetent person shall be tried, convicted, or sentenced for the commission of an offense so long as such incapacity continues.' The federal due process clause is in accord. [FN44]

FN44. *Pate v. Robinson,* 383 U.S. 375, 385, 86 S.Ct. 836, 15 L.Ed.2d 815 (1966).

A.

Based on his right to procedural due process, Riofta contends that the trial court erred by not holding a competency hearing before trial. A competency hearing is required ' {w}henever ... there is reason to doubt {a defendant's} competency {.}' [FN45] 'There are no fixed signs which invariably require a hearing, but the factors to be considered include ... a defendant's irrational behavior, his demeanor, medical opinions on competence and the opinion of defense counsel.' [FN46] When the court has reason to doubt competency, it must order a competency examination. [FN47]

FN45. RCW 10.77.060(1)(a).

FN46. *State v. O'Neal,* 23 Wn.App. 899, 902, 600 P.2d 570, *review denied,* 93 Wn.2d 1002 (1979).

FN47. *City of Seattle v. Gordon,* 39 Wn.App. 437, 441, 693 P.2d 741, *review denied,* 103 Wn.2d 1031 (1985).

To show that the trial court had reason to doubt his competency before trial, Riofta points to the evaluations done by Dr. Danner and Dr. Olsen after trial, as well as to the affidavits submitted by his former attorneys after trial. The record does not show, however, that the information in any of these materials was made known to the trial court before or during trial. Nor does the record indicate that Riofta's demeanor in open court was bizarre enough to require an inquiry into competency. [FN48] In sum, the record does not show that the trial court had reason to doubt competency before trial or that the trial court should have held a hearing before trial.

FN48. *Compare State v. Lord,* 117 Wn.2d 829, 901, 822 P.2d 177 (1991), *cert. denied,* 506 U.S. 856 (1992) (no error in not delving into competency even though defendant told court 'he had a conversation with the Lord and the devil and the devil asked him to drink a cup of his own blood to prove his innocence').

B.

Based on his right to substantive due process, Riofta argues that the trial court erred by trying and convicting him while he was incompetent. A defendant has a due process right not to be tried or convicted while incompetent. [FN49] He or she is incompetent if he or she 'lacks the capacity to understand the nature of the proceedings against him or her or to assist in his or her own defense as a result of mental disease or defect.' [FN50]

FN49. *Drope v. Missouri,* 420 U.S. 162, 172, 95 S.Ct. 896, 43 L.Ed.2d 103,(1975); *Pate,* 383 U.S. at 385; *In re Personal Restraint of Fleming,* 142 Wn.2d 853, 863, 16 P.3d 610 (2001) (citing *O'Neal,* 23 Wn.App. at 901).

FN50. RCW 10.77.010(14); *In re Fleming,* 142 Wn.2d at 862.

After a post-trial hearing, the trial court ruled that Riofta had been competent at trial. It relied on its own observations, on opinions from Dr. Danner and Dr. Olson, and on opinions from Riofta's former counsel. It noted that Riofta had 'participated in the defense; participated in interviews; participated in discussions both pretrial and also during the trial.' [FN51] It noted that Dr. Danner had said he could not 'look backwards and say with any degree of specificity that Mr. Riofta was not competent in November of 2000 .' [FN52] It had read Dr. Danner's comment that Riofta was 'aware of the process and involved during his trial {.}' [FN53] It had heard Walker's testimony that Riofta appeared to understand the nature of the charges; that Riofta seemed to have a reasonable recollection of events; and that Riofta had assisted in his defense by discussing potential plea bargains, witnesses, and discovery. Despite the contrary suggestions from other attorneys, the record the trial court considered amply supported its finding that Riofta had been competent during trial.

FN51. RP at 457.

FN52. RP at 457.

FN53. CP at 407.

V.

*8 The final issue is whether Riofta received ineffective assistance of counsel. To establish ineffective assistance, he must show deficient performance and resulting prejudice. [FN54] To show deficient performance, he must show that counsel's performance fell below an objective standard of reasonableness, considering all the circumstances. [FN55] To show resulting prejudice, Riofta must show that but for counsel's deficient performance, the trial's outcome would have been different. [FN56] He claims to have met these requirements here because Walker (A) failed to raise competency before trial and (B) failed to retain and present an expert on eyewitness testimony.

FN54. *Strickland v. Washington,* 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. McFarland,* 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995).

FN55. *Strickland,* 466 U.S. at 688.

FN56. *McFarland,* 127 Wn.2d at 337.

A.

Riofta first claims that Walker was ineffective by not raising doubt about competency before trial. Walker testified that he thought Riofta was competent to stand trial. The record does not show that he should have believed otherwise, notwithstanding the declarations of attorneys who themselves did not voice concern about competency until after the verdict. Riofta has not shown deficient performance because Walker failed to request competency hearing. [FN57]

FN57. *In re Fleming,* 142 Wn.2d 853, is consistent with this result. In that case, defense counsel possessed two mental health reports before the defendant plead guilty. One report characterized the defendant as psychotic at the time of the crime and marginally competent to stand trial. *In re Fleming,* 142 Wn.2d at 858. The other report characterized the defendant as incompetent to stand trial. *In re Fleming,* 142 Wn.2d at 858. Here, there were no such reports before trial and, as the text discusses, Riofta has not shown that there should have been such reports before trial.

B.

Additionally, Riofta claims that Walker was ineffective by failing to retain and present an expert on eyewitnesses. Even the best attorney does not retain such an expert in every case; rather, he or she makes a judgment whether the expert is likely to help. In this case, Walker's judgment was that the expert might not have helped, and even might have hurt. This was a tactical decision within his province, and thus not deficient performance. [FN58]

FN58. See *State v. Benn,* 120 Wn.2d 631, 665, 845

P.2d 289, *cert. denied,* 510 U.S. 944 (1993) (legitimate trial tactics cannot be basis for ineffective assistance claim).

Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

We concur: BRIDGEWATER, J. and HUNT, C.J.

118 Wash.App. 1025, 2003 WL 22039947 (Wash.App. Div. 2)

END OF DOCUMENT

A copy of the mandate will be provided to the Court at a later date.

May 28, 2002

Mr. Gerald Horne
Chief Prosecuting Attorney for Pierce County
Office of the Prosecuting Attorney
County City Building
930 Tacoma Avenue South, Room 946
Tacoma, WA 98402-2177

Re: State v. Alexander Riofta
Superior Court No. 00-1-00511-5
Court of Appeals No. 29209-7-II

Dear Mr. Horne:

I am writing to request DNA testing of the hat that is Exhibit 13 in the above-entitled case.

Let me give you a little background. This was an eyewitness identification case. The single eyewitness testified that my client, Alex Riofta, stopped a car in front of his house, got out, and shot several times at him. Mr. Riofta was convicted of assault in the first degree, along with a deadly weapon sentencing enhancement. There was no DNA testing done, to my knowledge, prior to trial, and there was no corroborating scientific evidence offered by either party or admitted at the trial. Mr. Riofta has consistently denied committing this crime. He does, however, live in the same neighborhood as the victim and had a passing acquaintance with the victim's family – a matter that we believe explains the misidentification.

Following the trial of this case, I substituted in as counsel of record for Alex Riofta and represented him at his post-trial motions to vacate, related evidentiary hearings, and sentencing. I am currently representing him on his appeal. Those post-trial motions, and the appeal, provide detailed reasons for the likely misidentification, complete with a psychologist's report and a description of the lighting level, source, and relevant factors relevant to misidentification. They also show that Mr. Riofta had substantial, undiagnosed, psychological problems – problems that rendered him incompetent in the opinion of *both parties'* experts, at least after the trial, and landed him at Western State, which explained his otherwise bizarre mannerisms and demeanor. The deputy prosecutor who tried this case was Lisa Wagner, and I of course invite you to contact her, or me, if you want any further information or documentation.

There was one piece of clothing that was retrieved at the scene of the crime: a hat, which was admitted as Exhibit 13. The victim testified that the shooter wore this item of clothing at the

time of the shooting. My client has consistently taken the position that it was not his hat, and he never saw it before in his life.

If the victim is correct that the shooter wore this hat at the time of the shooting; and if the hat, as Exhibit 13, has been in the safekeeping of the state or the court since that time; then it might retain hairs or other biological material from the head of the actual shooter. It is for this reason that we request, pursuant to RCW 10.73.170, that the hat be taken from evidence and that any remaining hairs or other biological material found on the hat be tested. We have reason to suspect that the actual shooter, whose hairs might remain on that hat, would have DNA already in the state's DNA bank that might be matched.

The statute permitting such post-conviction DNA testing mandates that it occur if the result "would demonstrate innocence on a more probable than not basis." RCW 10.73.170. I will not take your time by going through the evidence in this case in detail. Suffice it to say that without the eyewitness identification, the rest of it was purely circumstantial and there was no corroborating scientific evidence. Further, we obtained, shared with the prosecution, and have filed with the court, a post-trial declaration of an eyewitness identification expert who details all of the reasons – including dim lighting, weapons focus, time of day, and absence of any glimmer of recognition by the victim of the shooter at the time – why the victim's identification should be considered suspect. I would be happy to supply you with a copy of the Opening Brief of Mr. Riofta on appeal, if you are interested in evaluating the strength of these arguments and the likelihood of an improper conviction for yourself.

I look forward to hearing from you about this request. I would specifically call to your attention the mandate of RCW 10.73.170(4), which states: "Notwithstanding any other provision of law, any biological material that has been secured in connection with a criminal case, prior to July 22, 2001, may not be destroyed before January 1, 2005." Even if your office is inclined to deny this request for testing, we believe you have a duty to retain the hat and any biological material that it may contain, so that we can pursue any other appropriate avenues for obtaining such testing.

Very truly yours,

Sheryl Gordon McCloud

SGM: kr

cc: Alexander Riofta
Katherine Riofta and Drew Folsom
Jennifer Saldana

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Valid only within Washington State

June 26, 2002

Ms. Sheryl Gordon McCloud
Attorney at Law
1301 Fifth Ave., Ste. 3401
Seattle, WA 98101-2605

Re: Alexander Riofta; request for DNA testing

Dear Counselor:

Thank you for your letter of May 28. I have studied your client's request for analysis of a hat found at the crime scene, and I have communicated with the deputy who handled the trial. I have also considered the language and intent behind RCW 10.73.170. I decline to request that the Washington State Patrol Crime Laboratory analyze the hat for the presence of biological material and possible DNA.

First, your client's request does not fit within the parameters of RCW 10.73.170. The statute requires that the convicted felon submit his request to the Prosecuting Attorney:

> if DNA evidence was not admitted because the court ruled DNA testing did not meet acceptable scientific standards or DNA testing technology was not sufficiently developed to test the DNA evidence in the case.

I believe that the law was enacted to address cases handled years ago, where a defendant was unable to seek testing, due to inferior technology or because a court, applying "old" law, was unwilling to admit the evidence. But your client's case was recently tried. Courts today routinely admit DNA evidence. Current technology is able to develop a genetic profile from very small amounts of biological material. Thus, your client's case does not fall under the language and purposes of the statute. Stated differently, your client's trial attorney, for whatever reason, during trial preparation, evidently chose to not seek any DNA testing of the hat, even though the lawyer could have done so, and there is no refuge to be found in the statute.

The statute is not designed to provide felons a second opportunity to develop evidence

which might be persuasive to the fact-finder. The law exists to provide an opportunity for DNA analysis to those felons who did not have that opportunity when their cases were resolved.

I believe that it would be poor public policy, and beyond the intent of the Legislature to give relief to felons who 1) choose to pass up the opportunity for DNA testing before trial, and 2) upon conviction, demand DNA analysis of evidence which could have been analyzed before.

While I do not know why your client's trial attorney chose not to seek DNA testing, I can certainly see that it was a tactical decision. If the DNA testing revealed the presence of DNA consistent with your client's, the strength of State's case at trial would have been greatly improved as it would have connected your client with the stolen car and the scene of the shooting and provided corroboration of the identification. But, as discussed below, the lack of his DNA in the hat would have proved little. Before trial there was considerable downside risk to seeking testing. Now, having been convicted, your client runs no risk of seeking the testing. Inculpatory results would not even harm his pending appeal as the test results would not be before the appellate court as part of the record on review.

However, the absence DNA consistent with your client's would not demonstrate his innocence. The hat found at the scene belonged to the owner of the Honda Civic used in the shooting and had been stolen with the car a short time before the shooting. The shooter wore the hat during the assault and dropped it as he fled the scene. Thus, the shooter would have worn the hat very briefly, making it less likely that any biological material from the shooter would be found in the hat. I am unaware of any credible expert that would testify with reasonable scientific certainty that the absence of your client's biological material in the hat proves that he was not the shooter. At best, your client could hope that biological material other than his own or the hat's owner would be found on the hat. However, I have no information that the only people to ever wear this hat were its owner and the shooter. A friend of the owner could have worn the hat and left biological material in it. Nor do I believe that wearing the hat is the only means by which biological material could have been deposited on the hat. Again, no credible expert would testify that the presence of someone else's DNA on the hat proves that that person was the shooter. Thus, even the presence of an unidentified third party's DNA would not prove your client's innocence on a more probable than not basis. At most, such evidence could have provided the defense an additional argument regarding the reliability of the eyewitness identification; this is a far cry from constituting evidence of your client's *innocence*.

Your letter alludes that the "actual shooter's" DNA would be in the State's DNA bank. This suggests that you have a specific person in mind that was involved in this shooting. However, this statement carries no impact with me as you provide no concrete information for me to consider in connection with your request for testing.

Therefore, assuming that your client's case fit within the meaning of the statute - which it

does not, still, I am not convinced that DNA testing would show a probability of his innocence. So, for both reasons, the inapplicability of the statute, and the specific facts of this case, I am unwilling to seek DNA testing of the hat.

Sincerely,

Gerald A. Horne
Prosecuting Attorney

CC: Lisa Wagner

July 3, 2002

CERTIFIED MAIL
Mr. John Scott Blonien
Senior Assistant Attorney General
Criminal Justice Division
P.O. Box 40116
Olympia, WA 98504-0116

Re: State v. Riofta
Superior Court No. 00-1-00511-5
Appeal from denial of request for DNA testing

Dear Mr. Blonien:

As you know, recently enacted RCW 10.73.170 gives certain criminal defendants the right to seek post-trial DNA testing of evidence, if there is some likelihood that the DNA evidence would help that convicted criminal defendant demonstrate innocence. Subsection (3) of that statute provides that a person whose request for post-trial DNA testing is denied by the county prosecutor has a right to appeal to this office.

This letter is an appeal of the Pierce County Prosecutor's decision to deny Alexander Riofta's request for post-trial DNA testing.

Alex Riofta was convicted following a jury trial of the crime of first-degree assault. This was an eyewitness identification case. The single eyewitness testified that Mr. Riofta stopped a car in front of his house, emerged from the car, and then shot several times. Mr. Riofta was convicted of assault in the first degree, along with a deadly weapon sentencing enhancement. There was no DNA testing performed at any time, and there was no corroborating scientific evidence offered by either party or admitted at the trial.

Mr. Riofta has consistently denied committing this crime. He lived in the neighborhood and had a passing acquaintance with the victim's family. We believe that this familiarity factor, combined with the poor lighting conditions, weapons focus, event stressors, and possible similarity between Mr. Riofta's racial appearance and that of the actual shooter, contributed to the misidentification. We are seeking the DNA testing in the hope that it might help identify the actual shooter (as I discuss further below).

Appendix 6(c)

1301 Fifth Avenue Suite 3401 Seattle, WA 98101-2605 • *voice*:206.224.8777 • *fax*:206.447.1973

I am attaching to this letter, as Appendix A, a copy of my initial letter to Mr. Gerald Horne, Chief Prosecuting Attorney for Pierce County, explaining the basis for my request for post-trial DNA testing. Essentially, that letter explains likely reasons for the eyewitness misidentification, complete with an explanation of the psychologist's report and a description of the lighting level, lighting sources, and other relevant factors that influenced the victim's ability to perceive during the assault. In fact, I am attaching a copy of that psychologist's report as Appendix B to this letter, for your perusal. Further, I am attaching as Appendix C the letter from the Pierce County Prosecutor, denying our request. Finally, I am attaching the Opening Brief on appeal as Appendix D. I do this only to show that there are many reasons to doubt whether the victim identified the real assailant in this case.

Let me use this appeal as an opportunity to explain how simple and straightforward our request is, how easy it would be to accomplish, how inexpensive it could be for the state, and the potential benefits it would have for all of us.

There was one piece of clothing that was retrieved at the scene of the crime: a hat, which was admitted as Exhibit 13. The victim testified that the shooter wore this item of clothing at the time of the shooting. My client has consistently asserted that it was not his hat, and that he never saw it before in his life.

If the victim is correct that the shooter wore this hat at the time of the shooting; and if the hat has been in safekeeping since that time; then it might retain the hairs from the head of the actual shooter. It is for this reason that we request that the hat be taken from evidence, and that any remaining hairs of other organic material found inside the hat be tested.

Mr. Horne, the Pierce County Prosecutor, denied this request, expressing his concern that he did not want Mr. Riofta to gain a tactical advantage, after trial, through this sort of testing, at the state's expense.

I have proposals for addressing those concerns.

I can inquire of Mr. Riofta's family whether they would be willing to pay for the cost of this DNA analysis. If they are able to bear this expense, that should take care of any issue about expense to the state.

In order to take care of the concern that there might be some sort of tactical advantage to be gained by this, I can also inquire of Mr. Riofta if he would be willing to stipulate in advance to the admissibility of any such DNA results at any portion of these proceedings. If he agrees, that should take care of any possible issue about him trying to benefit from exculpatory results, but evade harm from potentially inculpatory results.

I am hoping to convince you that there would be no downside to the state – either financially or legally – to agreeing to these tests. In addition, there might be a substantial benefit to both the state and the defense. I have received information indicating that the actual shooter is a person with an arrest and conviction history, whose DNA would therefore, in all likelihood, be available to the state already. If DNA results from the hat are inconsistent with DNA from Mr. Riofta, but match the DNA profile of someone else who is already in the state's DNA banks, then we will have done a great service to not just Mr. Riofta, but also to the community in finding the true assailant in this case.

I look forward to hearing from you.

Very truly yours,

Sheryl Gordon McCloud

SGM: kr

cc: Alexander Riofta
Katherine Riofta and Drew Folsom
Jennifer Saldana

Christine O. Gregoire
ATTORNEY GENERAL OF WASHINGTON
PO Box 40116 • Olympia WA 98504-0116 • Phone (360) 586-1445

July 18, 2002

RECEIVED
JUL 22 2002
S. GORDON McCLOUD

Sheryl Gordon McCloud
Attorney at Law
1301 Fifth AVE, Ste 3401
Seattle WA 98101-2605

Re: In re the Application of Riofta

Dear Ms. McCloud:

This will acknowledge receipt of your July 3, 2002, letter and attachments. You have asked that the Attorney General's Office pursuant to RCW 10.73.170 review the decision of the Pierce County Prosecuting Attorney's Office denying your request for trial DNA sampling and testing. I found the attachments very informative and beneficial.[1]

By way of process, I intend to give you and the prosecutor's office every opportunity to offer anything that you think is relevant and the opportunity to address or respond to matters presented by the other. Also, I reserve the right to ask any questions that I feel are necessary so that I may make an informed decision. It should be obvious from the above that I intend to share with each matters presented by the other. I hope you will find the process fair and beneficial.

As mentioned above, I have read your letter and attachments and they were very helpful, but they do raise a couple of questions. I note that at the time of trial no DNA testing was done on the hat. Why? Was it an "oversight" or a tactical decision? Was testing requested and then denied by the court? Is the hat still in evidence? Also, could you please give me a timeline of events in this case from commission of the crime to the present? Finally, assuming that testing is done, and it shows that the DNA is not your client's, couldn't the person with the DNA match have worn the hat at sometime before the crime? In short, what exculpatory value is the test?

Thank you for your submission and for the opportunity to be involved in this matter.

Sincerely,

JOHN SCOTT BLONIEN
Sr. Assistant Attorney General
Criminal Justice Division

JSB:bg
cc: Gerald Horne

Appendix 6(d)

[1] However, I note that your letter refers to an "Appendix D" which is represented as your opening brief in this matter. Please note that your mailing to me did not include an "Appendix D". If you want me to consider it, please forward it.

Christine O. Gregoire
ATTORNEY GENERAL OF WASHINGTON
PO Box 40116 • Olympia WA 98504-0116 • Phone (360) 586-1445

July 19, 2002

Gerald Horne, Prosecuting Attorney
Pierce County
930 Tacoma AVE S., Rm. 946
Tacoma WA 98402

Re: In re the Application of Riofta

Dear Mr. Horne:

Recall that attorney Sheryl Gordon McCloud had previously asked that your office conduct DNA sampling and testing of a hat which allegedly was worn by the defendant in the above matter. Ms. McCloud writes that you have rejected her request and has, pursuant to RCW 10.73.170, asked me to review the matter. I have enclosed for your edification a copy of Ms. McCloud's letter to me and the attachments that accompanied it. Also please find enclosed a copy of my letter to Ms. McCloud.

Note that Ms. McCloud, in an effort to address your concerns, offers to assure that the state won't be liable for the cost of testing and that her client will stipulate to the use of DNA results regardless of what they are. Does this impact your decision to deny testing?

Finally, if there is anything more you want to offer, please feel free to do so. If I don't hear from you by August 2, 2002, I will assume that you don't have anything more to offer.

If you have any questions, please don't hesitate to contact me.

Sincerely,

JOHN SCOTT BLONIEN
Sr. Assistant Attorney general
Criminal Justice Division

JSB:bg
Enclosures
cc: Sheryl Gordon McCloud

Pierce County
Office of the Prosecuting Attorney

REPLY TO:
CRIMINAL FELONY DIVISION
930 Tacoma Avenue South, Room 946
Tacoma, Washington 98402-2171
Criminal Felony Records: 798-6513
Victim-Witness Assistance: 798-7400
FAX: (253) 798-6636

GERALD A. HORNE
Prosecuting Attorney
Main Office: (253) 798-7400
1-800-992-2456
(Valid only within Washington State)

July 23, 2002

John Scott Blonien
Sr. Asst. Attorney General
P.O. Box 40116
Olympia WA 98504-0116

Re: Your letter of July 19; Riofta case

Dear Mr. Blonien:

Thank you for contacting me to explain that you are reviewing my decision denying DNA testing in the Riofta case. It appears to me that you are conscientiously applying the relevant statute by affording me and the Defendant full opportunity to be heard. I agree with the importance you are placing on discerning and following the Legislature's intent.

Contrary to Ms. McCloud's suggestion, I did not deny Riofta's request because of the "cost" or because I fear the defense would have a "tactical advantage." It appears to me that Ms. McCloud has misunderstood or ignored my reasoning in denying the request. The chief problems are 1) the Legislature limited eligibility under the statute, and Riofta's situation does not qualify because he could have sought DNA testing pre-trial but chose not to do so; and 2) DNA testing could not show Riofta's innocence on a more probable than not basis. Ms. McCloud's offer to cover the cost of the testing or to stipulate on the "admissibility" of test results are diversions from the crux of the matter I have identified and which she completely fails to address in her letter to you.

Thank you for your attention to this matter.

Sincerely,

Gerald A. Horne
Prosecuting Attorney

Appendix 6(f)

KRISTI L. MINCHAU
SVERRE O. STAURSET, PLLC
ATTORNEYS AT LAW

724 So. Yakima 2nd FLR
Tacoma, WA 98405
(253) 572-8880 PH
(253) 572-3395 FAX

7-29-02

John Scott Blonien
Sr. Asst. Attorney General
Criminal Justice Division
PO Box 40116
Olympia, WA 98504-0116

RE: In re the Application of Riofta

Dear Scott:

Greetings old friend and former boss! I understand you have some questions regarding this matter that I may be able to answer.

I represented Jimmee Chea in the Trang Dai murder case from which the Riofta case allegedly evolved. Jimmee was a big guy in the local gang and had a lot of good information when he chose to share it with the defense (which was not often). I found his information to be reliable and accurate, not just occasionally, but always. One of the tidbits he told me was who actually committed the shooting for which Alexander Riofta has been convicted and why the victim lied about the shooter's identity.

Unfortunately, I have not been granted permission from my client to disclose the identity of the shooter. However, I can tell you that it is someone who has a prior conviction in Washington for a violent offense and whose DNA should be on record unless the testing is backlogged into 1998. If, as the victim claimed, the shooter wore the hat that was recovered in the stolen car, this person's DNA may be recoverable and traced through the data bank.

Scott, I have absolutely no reason to doubt what Jimmee told me. I also have absolutely no stake in the Riofta case. But if this guy has been wrongly convicted, he deserves a chance at proving it and the rightful shooter should be nailed. If you have any questions, please feel free to call.

Sincerely,

Kristi

Kristi L. (Weeks) Minchau

cc: Sheryl Gordon McCloud

Appendix 6(g)

The Law Offices of
Sheryl Gordon McCloud

August 7, 2002

John Scott Blonien
Senior Assistant Attorney General,
Criminal Justice Division
Office of the Attorney General
P.O. Box 40116
Olympia WA 98504-0116

Re: Alexander Riofta

Dear Mr. Blonien:

Thank you for your letter requesting further information about the DNA testing that we seek in the Riofta case. I will try to answer your questions.

No Request for DNA Testing Was Made at Trial

You asked whether a request for DNA testing was made at trial and if not, why not.

I spoke this morning with deputy prosecutor Lisa Wagner, who tried this case for the state. She confirmed what the file seemed to reveal: DNA testing was never requested by the defense at trial. Hence, her office was never asked to take a position on whether DNA testing was appropriate in court, and the trial judge was never asked to rule on this issue.

It Appears that the Failure to Seek DNA Testing Was Due to Oversight

The second part of your question is a bit more difficult to answer. I believe it involves an oversight by the trial lawyer, but since he has not returned my calls that I started making to his office when I received your letter, I have not been able to confirm this with him. (I should add that his office first informed me that he was in trial, and his office's answering machine now informs me that he is on vacation until August 19, 2002, so he might have been unable to return my calls for those reasons.)

I would like to tell you why I believe that the failure to seek DNA testing was due to trial counsel's oversight. If you have had a chance to read the Opening Brief, you know that there were some remarkable problems with Mr. Riofta's trial court representation. Through no fault of his own, he was saddled with five separate lawyers prior to trial, both appointed and retained, and I think that by the time appointed counsel Mr. Allen Walker was assigned to take the case to trial, not much more was done to prepare. Let me explain.

After two appointed lawyers initially entered their notices of appearance on behalf of Mr. Riofta, a Notice of Appearance was filed on February 15, 2000, by retained attorney Lance Hester. The state moved to disqualify Mr. Hester's office; it asserted that Mr. Purtzer of that office simultaneously represented a separate criminal defendant in a separate criminal case (the Trang Dai murder case), and that the state might make an offer of leniency to one client at the expense of the other. Defense counsel objected, but the court disqualified him nonetheless.

New counsel was appointed, but the family of Mr. Riofta again sought a retained lawyer.

The family then hired what they hoped would be the final lawyer for the case, a George Beckingham. I don't know him; he is from the Tacoma area, and I assume that the prosecutor's office in Pierce County would be more familiar with him than I am. For whatever reason, this lawyer took the Riofta family's money and left town. He disappeared. He missed required appearances, filings, and meetings with his client. He apparently closed up his practice and moved out of state. This resulted in a series of continuances, over Mr. Riofta's objection, while trying to get Mr. Beckingham to appear. The Court finally removed Beckingham and continued trial for two months, to October of 2000, so an appointed lawyer could take over the case. That appointed lawyer was trial counsel, Allen Walker.

When the trial date arrived, the state moved for another continuance due to a missing witness. Over Mr. Riofta's objection, trial was again continued, this time until November 27, 2000.

I provide you with this history only so that you will understand that Mr. Walker took over a case that had been neglected and continued, with a client who was abused by a privately retained attorney who betrayed his trust and stole his family's money. It was not an easy situation to step into.

I believe that the record shows that trial counsel was unable to rise to the occasion in this difficult situation. He treated the trial as though the entire outcome hinged on the suppression hearing, and when the motion to suppress was denied, other defense strategies were not explored.

For example, the record clearly shows that the client had serious mental problems that were unexplored by trial counsel. A defense-initiated psychological report submitted post-trial and pre-sentencing (after I substituted in as counsel) revealed that Mr. Riofta is psychotic and suffers from a paranoid disorder with persecutory delusions, along with other psychological

problems, including near borderline intelligence. (I believe I provided you with a copy of this report along with my first letter to your office.) Dr. Olsen's report provided evidence, based on a thorough social history and psychiatric evaluation, of psychosis, paranoia, and a likelihood of organic brain damage due to continued beatings starting *in utero*, through early and later childhood. It shows how this combination of problems, along with several others (probable attention deficit disorder, pervasive developmental disorder of childhood, possible schizophreniform disorder, etc.), undermined Mr. Riofta's ability to perceive, to communicate, and to function in the world.

The report even showed how these problems impaired Mr. Riofta's ability to communicate with counsel, and raised the probability that the psychosis-induced inability to communicate rendered Mr. Riofta incompetent to stand trial.

The state's own expert examined Mr. Riofta after this report was submitted to the court and he – Dr. Danner – *agreed* that Mr. Riofta was incompetent. Both psychologists agreed that Mr. Riofta suffered from serious disorders; the state's expert, Dr. Danner, diagnosed bipolar disorder and an Axis I disorder.

Mr. Riofta's mental problems were not well hidden. The other lawyers who represented Mr. Riofta pre-trial noticed sufficient oddities in his manner and in his attempts at communication that they suggested an overriding psychological problem that required further investigation. Trial counsel Linda Sullivan, who represented Alex Riofta on an unconnected matter that was settled for a plea to a misdemeanor immediately before the proceedings in this case, recalled, "that when I met with Alex Riofta in the jail, it looked to me as if it hurt his head to think." (This is contained in the Declaration of Counsel Linda R. Sullivan, filed with the trial court.) She continued that she had substantial problems understanding Mr. Riofta: "Our conversations were always disjointed." She candidly continues:

> If I had not been able to achieve [a misdemeanor] settlement, I certainly would have considered moving the Court for an order providing funds for a psychological evaluation for Mr. Riofta, to determine if there were any psychological defenses or mitigating factors.
>
> ... I would have done this because *his behavior and speech patterns raised substantial questions in my mind about whether he could have assisted me in the defense of a trial on a felony charge.*

Sullivan Declaration, p. 2 (emphasis added).

During the short period of time that Mr. Purtzer worked on the Riofta case, it also became apparent to him that Mr. Riofta suffered psychological problems, making communication difficult to impossible. As Mr. Purtzer's Declaration (also on file with the trial court) shows, had

he remained on the case he would have obtained expert psychological assistance to evaluate Mr. Riofta.

Trial counsel Mr. Walker testified at a post-trial hearing that he, too, recognized that there were some red flags concerning Mr. Riofta's mental status. He stated at that hearing that he was "familiar" with the fact that Mr. Riofta had a prior inpatient commitment to a mental hospital as a child. 12/12/01 TR:424. In fact, Mr. Walker admitted that he was concerned enough about Mr. Riofta's competency that he had inquired of Mr. Riofta's jail MHP and the family concerning whether he was competent or not – but that none of them were qualified to diagnose competency and he never turned to anyone who was. 12/12/01 TR:424-26.

In spite of all this, Mr. Walker stuck with his belief that Mr. Riofta was fully competent and did no further investigation in this regard. He did not seek appointment of any mental health experts concerning competency, or even concerning mitigation of sentence.

This is not just my view. The trial court agreed that Mr. Riofta suffered significant competency and other psychological problems that trial counsel had failed to raise. When we brought concerns about Mr. Riofta's competency to the court's attention post-trial, psychologists from Western State visited Mr. Riofta at the Pierce County Jail, evaluated him, and found that he was *not* competent. The trial court signed an agreed order committing Mr. Riofta to Western State Hospital, to undergo "evaluation and treatment to restore defendant's competency."

It was not until several months later that Mr. Riofta was transferred back from Western State, and that the trial court found that he had been returned to competency.

The trial court further ruled that Mr. Riofta's mental problems, which went unnoticed by trial counsel, were so significant that despite restoration to competency they still constituted mitigating factors that justified an exceptional sentence below the SRA range. The trial court entered Findings of Fact and Conclusions of Law in Support of Exceptional Sentence showing that it agreed Mr. Riofta had serious psychological problems, even at the time of the crime, and that these problems adversely affected his ability to perceive and to communicate. The trial court acknowledged that Mr. Riofta had a history of "cognitive and communications problems [that] impaired his ability to function in his daily life," and that these problems predated this crime. The trial court found as fact, "Mr. Riofta has been credibly diagnosed with a paranoid disorder, persecutory type; probable attention deficit disorder; pervasive developmental disorder of childhood; anxiety and other disorders, and possible schizophreniform disorder." The trial court's findings continued, "Although Mr. Riofta is now legally competent, he does not comprehend basic facts about the world around him, perceives them improperly, and lacks a certain ability to communicate intelligibly. He also lacks a certain capacity to understand basic social cues." Finally, that court found: "The psychological evaluations of Mr. Riofta as seriously disturbed, in a manner that affects his ability to perceive and to function in the world, is uncontradicted," and "[p]sychological reports raising the probability that Mr. Riofta suffers organic brain damage are uncontradicted."

There is another serious indication of defense trial counsel's failure to take necessary steps for Mr. Riofta in the file. Defense trial counsel failed to seek appointment of an eyewitness identification expert for consultation, reports, or testimony. He did not even attempt to contact such an eyewitness identification expert, despite the fact that this was an eyewitness identification case in which the client consistently maintained his innocence. Mr. Walker testified in a post-trial hearing that he never even considered using or consulting one. 12/12/01 TR:412-13, 427.

In fact, on cross-examination, defense counsel revealed his limited knowledge in this area by acknowledging that he had never retained, used, or consulted with an eyewitness identification expert, ever, despite his "[e]leven and a half years" of criminal practice in Pierce County. 12/12/01 TR:417-28. His complete knowledge about what such an expert might be able to do was, "I guess I would probably consult with the expert as to how they could help. I know that my former partner used one one time when we were together to, I guess, explain or try to explain – I can't recall what the specific issue was. Give perception explanations and maybe possible misperception explanations, those kinds of things." 12/12/01 TR:428.

I am sorry to provide you with such a long answer to a short question about whether the failure to seek DNA testing was due to oversight or tactics. But I cannot give you firsthand information about why Mr. Walker did not seek DNA testing at trial, since he has not returned my recent calls. I can only surmise from this record that he was placed in a very difficult situation when he took over this case following the removal, conflict, or flight of the previous defense lawyers. It appears that when placed in this difficult situation, he failed to follow through in several areas: he did not appreciate the seriousness of Mr. Riofta's psychological problems; he failed to understand the need for expert psychological assistance; he failed to note Mr. Riofta's incompetency; he did not understand the importance of the eyewitness identification issue by failing to consult or seek appointment of an expert in this field; and I suspect that he failed to seek DNA testing because he failed to appreciate its importance, also. I should add that Mr. Walker did permit me to review his file when I took over the case, and to the best of my memory, there was absolutely no reference to DNA testing there.

In this situation, I do not think the state would be giving the defense an improper advantage by allowing us to obtain, now, what the trial lawyer failed to obtain.

<u>The Hat is Still in Evidence</u>

Your letter continues by asking whether the hat is still in evidence. The answer is yes. It was marked as an exhibit at trial. I confirmed with Pierce County Deputy Prosecutor Lisa Wagner over the telephone just this morning that the hat remains in evidence, and that typically it would be retained in evidence at least until the end of Mr. Riofta's appeals (which are pending).

Timeline of Events

You next request a timeline of events in this case. You did not have the Opening Brief in hand when you made that request, and I am hoping that the brief that we mailed to you a couple of weeks ago now answers some of your questions. For the sake of convenience, I will repeat some of that history here. I include references to the record, so you can verify my assertions.

On the morning of January 27, 2000, Ratthana Sok left his garage at around 6:40 a.m. After opening the door of the garage, he noticed there was a Honda parked by the street. He had never seen that car before. There were two or three people inside, and one emerged and asked him for a cigarette. 11/28/00 TR:175-81. Ratthana Sok testified, "I recognize him when he came up to me close." 11/28/00 TR:182. He responded, "I don't smoke." The person then pulled a gun from his pocket. He thought it was a chrome revolver; "it was pointed straight to my forehead, and I could see the revolver." They were two to three feet apart with nothing in between because the gate was open. "I was in shock. I was in shock." "He started shooting, so then I ran inside the house. Somehow got inside house." He heard four or five shots. 11/28/00 TR:182-185.

Ratthana testified at trial that he knew the shooter as someone who played basketball in a local park, and at trial he identified the shooter as Alex Riofta, claiming at that point that he saw the shooter's face "clearly." 11/28/00 TR:185-89.

Ratthana continued that they found a white hat out front afterwards, and that the shooter was wearing the hat when he shot. 11/28/00 TR:190-92. Apparently it had been inadvertently left behind.

Ratthana Sok denied that he had ever stated anything other than that the shooter was Alex Riofta. 11/28/00 TR:198-203.

Nevertheless, the detective who first interviewed Ratthana Sok clearly testified that Sok did not identify the shooter as Alex Riofta. Instead, in this first conversation, Ratthana told the detective that the shooter just "looked like" Alex. Armin Keen, of the Tacoma Police Department, went to the scene of the shooting right after it occurred and testified about the bullet holes, a spent cartridge, and the description that the victim gave when he arrived. 11/28/00 TR:214-18. Contrary to Ratthana's assertions, Keen stated that Ratthana told him not that the shooter was Alex, but that "it looked like Alex." 11/28/00 TR:220. Keen reiterated this point and showed that it was supported by his initial reports which contained the same words from Ratthana Sok, that is, "It looked like Alex," not it was Alex. 11/28/00 TR:222-23.

Further, Ratthana himself acknowledged at trial that in a previous interview, he had stated that he did *not* see the shooter's face on the day of the shooting. 11/28/00 TR:209.

Who was this Ratthana Sok who was so confident at trial – but not before – that the shooter was Alex Riofta? Ratthana Sok is the brother of Veasna Sok, one of the defendants on trial for the multiple homicides known as the Tran Dai murders. Veasna Sok had been in the Pierce County Jail awaiting trial for the two years preceding Mr. Riofta's trial. 11/28/00 TR:175-77. Ratthana Sok was obviously someone who was familiar with gangs and violent crimes, and who perhaps might have some safety concerns for either himself or his brother if he were to identify as the shooter someone who was capable of retaliating.

In fact, at trial, Det. Tom Davidson explained what those safety concerns might be. He testified that he is the lead detective in the Trang Dai murder case. He attempted to explain a connection between the Trang Dai homicides and this attempted shooting. He explained that five people were killed in that cafe on July 5, 1998, and five others were wounded; that eight people were arrested for those murders; and that Veasna Sok, brother of Ratthana Sok, was one of those arrested. Veasna was charged with five counts of aggravated murder and five counts of first-degree assault. In May of 1991, Veasna agreed to cooperate with the State and to testify against other co-defendants in exchange for a specific jail sentence. 11/28/00 TR:238-41. Davidson continued that after Veasna made this deal, he was "assaulted in the courtroom by two of his co-defendants during a hearing." He identified those assailants as Jimmy Chea or "Cricket" and Johnny Phet or "Little Clumsy."

Veasna still agreed to cooperate.

But after the shooting of his brother, Veasna changed his mind. 11/28/00 TR:241-44.

Thus, Ratthana, the brother of Veasna Sok, might have good reason to try to protect himself and his brother by failing to identify the actual shooter.

Detective Davidson then testified that he arrested Mr. Riofta at his home. Riofta answered the door, invited them inside, and when they said he was under arrest, "he asked what for, and I told him a shooting that had occurred yesterday." Mr. Riofta began a tirade:

> He yelled, "I didn't shoot no motherfucker yesterday. I was here drinking all night. I worked yesterday from – at The News Tribune from 1:00 to 5:30. I don't even own no gun, how could I shoot some motherfucker?"

11/28/00 TR:251.

When interviewed at the station later, Mr. Riofta explained where he was on January 27: at work from 11:00 to 5:30 and then drinking a beer later with a friend, beginning at 11 am. He said that the night before he "had visited with friends named Isaac and Marty in Salishan, and that he then had walked home ...." When told that it was Ratthana who had been shot, Mr. Riofta "said he didn't shoot at him." He continued, though, with another tirade that the state might characterize as indicative of guilt but which we feel is more indicative of Mr. Riofta's

unbalanced mental state: "If I had shot at someone, I would kill them. I am not stupid enough to get identified." 11/28/00 TR:251-256.

Detective Davidson ultimately viewed the stolen Honda from which the shooter emerged. It belonged to a Mr. Ali Saleh. It was found after the shooting within a few blocks of Riofta's residence. It had no fingerprints. 11/28/00 TR:264-70. When Mr. Selah testified, he confirmed that the Honda was his; that it had been stolen on January 26 or 27, 2000; that it was recovered and returned two weeks later; and that *he had a white hat in the car when it was stolen, but not when it was recovered.* 11/28/00 TR:286-89.

Remember, though, that the shooting occurred on January 27, 2000, at around 6:40 a.m., so the shooter only had the car and the white hat for a very short time before the assault – thus increasing the probability that any hair deposited in it would either belong to Mr. Saleh, or else to the shooter.

Mr. Riofta's mother, Jennifer Saldana, testified for the defense. She explained that she works 6:30 a.m. to 2 a.m. in a bar; lives in Tacoma; and that she used to live with her husband, but that he had recently died. She said that Alex was arrested on a Friday. She worked backwards, explaining that on the day before, late Wednesday night-Thursday morning, she worked, as she did Thursday through Sunday. She returned home around 3 or 3:30 a.m. When she cleaned up, she saw Alex sleeping at about 4:00 a.m. She slept until 11:00 a.m., when he asked her for bus money before he went to work. She continued that she sleeps with the door open and "can hear somebody ring the bell or somebody take a shower or hallway walking around. I hear even when phone I have in the bathroom somebody call, that wake me up." So if Mr. Riofta were to leave, she would have heard. 11/28/00 TR:298-304.

Drew Folsom also testified. He is a 1989 University of Washington political science major and a land use technician in Bellevue who was and is the long-time (then, five-year) boyfriend of Mr. Riofta's sister. Mr. Folsom explained how he came to see Mr. Riofta asleep in his bedroom at about 5:45 a.m. He explained that he also worked part time for Reality Check, a secret shopper company that checks up on store employee performance. His birthday is January 25, and the morning after his birthday, he "went down to Shari's Restaurant on 72nd down there" as part of his shopper job, to eat and evaluate. He arrived at 5:45 am, and ate. He left at 6:30 a.m., and went to his girlfriend Kathryn Riofta's mother's house to pick up some clothes that she requested he retrieve. At the house, "Alex that morning was the only person that I actually saw." 11/28/00 TR:308-20. "He was asleep," 11/28/00 TR:320, "In his bedroom." 11/28/00 TR:320-21. Mr. Folsom drew a diagram of the house showing how he turned on the light in Alex's room, not realizing he was there; was shocked to see someone in there, asleep; and then "Turned off the light real quick, and then I went out of the room for a second, and – but I knew that the pants that I wanted to get were in that room." 11/28/00 TR:323-25. So, he testified, he went back in, using the hallway light, and found the pants. 11/28/00 TR:326.

Alex Riofta also testified, solely to identify his cell phone bill showing that he had not been using his phone on the morning of the shooting (apparently to show that he was not out and about that morning). 11/28/00 TR:332-33.

The record shows that no request for DNA testing was made prior to or during trial, and no DNA or other scientific evidence was ever introduced.

Will DNA Testing Be Conclusive?

Your final question is probably the most difficult to answer. No, DNA testing will not necessarily be conclusive. There is no guaranty that the shooter deposited any hair or other biological materials onto the hat.

But you also ask, "assuming the testing is done, and it shows that the DNA is not your client's, couldn't the person with the DNA match have worn the hat at sometime before the crime?"

The answer to this question is definitely NO. The trial testimony was uncontradicted that the shooter drove a very recently stolen car to the scene of the crime, and that the hat worn by the shooter was taken from the stolen car and then left at the crime scene. It belonged to an innocent person. The only people who would have worn the hat before the crime occurred, then, would be the innocent owner of the car (or perhaps other people known to him), and the shooter or his accomplice(s). The only time the shooter or his companion(s) would have had access to the hat was from the time that the car was stolen, shortly before the shooting, until the shooting itself. If biological material reveals a DNA match to someone who is not associated with the car's true owner, then it necessarily follows that the DNA donor would be the shooter or someone else in the car with him.

We Have New Information Concerning Mr. Riofta's Innocence and the Identity of the Real Shooter

I want to make one other point. I was recently given new information that another person committed this crime.

I received this information from an attorney, and the name of the shooter was given to her by her client. The attorney states that the actual identity of the shooter is privileged information and she has not shared that name with me. But the attorney has told me that according to this information, Mr. Riofta is innocent; the shooter was someone else; the shooter has a criminal history including a prior conviction for a violent offense occurring around 1998; and, hence, that this person would have DNA already on record that might be compared to any DNA recovered from the hat worn by the shooter.

Please don't take my word for this. I am attaching to this letter as Appendix A a letter from the Tacoma attorney who gave me this information, Ms. Kristi L. (Weeks) Minchau, verifying the information. She told me that she knew you, and she did not think that the formality of a sworn declaration was necessary, but she also stated that she would be happy to provide a sworn declaration or affidavit attesting to the same facts.

Conclusion

This is turning out to be a very unique case. It is not just a case where DNA testing might exonerate a convicted criminal defendant. It is a case where DNA testing might point to the true shooter, a person (unlike Mr. Riofta) who has a violent criminal history and who the state might be very interested in prosecuting. It is my belief that Mr. Riofta was named, instead, because he is a mentally unstable individual who makes a good patsy.

In addition, this is a case in which there is no downside to the state in terms of agreeing to DNA testing: we have asked Mr. Riofta's family to pay for the testing and I will seek to have Mr. Riofta sign whatever is necessary to stipulate to the admissibility of the results of the testing, no matter what they show.

I should add one more thing. I think some of the arguments in the appellate brief are quite strong. If the defense were to prevail on the appeal based on those legal arguments, it might be viewed as a "loss" to the state. If the state joins me in trying to identify the true shooter, and if we obtain any information of interest, then both sides will have done their best to seek the truth and both sides will win.

Please let me know if there is any other information I can give you.

Very truly yours,

Sheryl Gordon McCloud

SGM: kr

Enclosure

cc: Alexander Riofta
Kristi Munchau

bcc: Jennifer Saldana (w/ enc)
bcc: Katherine Riofta and Drew Folsom (w/ enc)

Christine O. Gregoire
ATTORNEY GENERAL OF WASHINGTON
PO Box 40116 • Olympia WA 98504-0116 • Phone (360) 586-1445

September 19, 2002

The Honorable Gerald A. Horne
Pierce County Prosecuting Attorney
Office of the Prosecuting Attorney
930 Tacoma Avenue South, Room 946
Tacoma, WA 98402-2171

Sheryl Gordon McCloud
Attorney at Law
1301 Fifth Avenue, Suite 3401
Seattle, WA 98101-2605

RE: Alexander Riofta

Dear Mr. Horne and Ms. McCloud:

Thank you both for your letters, responses and the additional documentation that I had requested. I read everything I was supplied, and I found it all very helpful. Thank you too for your patience in this matter.

By way of quick review, Alexander Riofta (DOC No. 805644) through his attorney Sheryl Gordon McCloud made application pursuant to RCW 10.73.170 for postconviction DNA testing. Ms. McCloud first made the request to the Pierce County Prosecuting Attorney's Office which was denied by Gerald A. Horne, the Prosecutor.

Now pursuant to RCW 10.73.170(3), Ms. McCloud "appeals" Mr. Horne's decision to the Attorney General's Office. Ms. McCloud's client was convicted of assault in the first degree for a shooting that occurred on January 27, 2000. Apparently, witnesses described the assailant as wearing a white hat. Subsequent investigations revealed that the assailant drove a stolen car which according to the car's owner had contained a white hat. A white hat was found at the crime scene. Ms. McCloud seeks to have the hat worn by the perpetrator tested for DNA. Ms. McCloud argues that if there aren't any of Mr. Riofta's hairs in the hat this tends to suggest that it wasn't Mr. Riofta who wore it, and therefore he was not the assailant. If another's hairs are present this would point to the true perpetrator. Ms. McCloud freely admits that Mr. Riofta's trial counsel declined to request DNA testing at trial.

Without statutory empowerment (RCW 10.73.170), the Attorney General's Office lacks any authority or responsibility in this matter. In enacting this provision, the legislature balanced the need to provide appropriate relief to a wrongfully convicted person, with the interest of finality of criminal judgments. In

so doing the legislature defined a narrow set of circumstances where postconviction DNA testing is appropriate. These provisions bare closer scrutiny.

The statute begins by saying,

> ". . . a person in this state who has been convicted of a felony and is currently serving a term of imprisonment and who has been denied postconviction DNA testing may submit a request . . . for postconviction DNA testing, if DNA evidence was not admitted because the court ruled DNA testing did not meet acceptable scientific standards or DNA testing technology was not sufficiently developed to test the DNA evidence in the case." [Emphasis added.]

It is clear from the above that the statute is designed to offer relief in cases where due to lagging technology DNA was not available to aid the defense. That clearly is not the case here. Mr. Riofta's trial was in November, 2000, and DNA technology was advanced, well established and reliable to conduct the kind of testing that Ms. McCloud now seeks. This request does not fall within the very narrow parameters of the statute, and therefore the Attorney General's Office lacks authority to act.

I would note in passing that if the Attorney General's Office had authority relief is appropriate only if ". . . it is likely that the DNA testing would demonstrate innocence on a more probable than not basis." I do not believe that the presence or absence of Mr. Riofta's or another's hair in the hat passes this threshold. If the hat doesn't contain any of Mr. Riofta's DNA material, this doesn't mean he didn't wear the hat. If the hat contains another's DNA material, this merely shows that at some time during the life of this hat this person wore that hat. If I view the above in a light most favorable to Mr. Riofta it does not show that more probable than not that DNA testing would show Mr. Riofta is innocent.

Finally, Ms. McCloud points out several irregularities that allegedly prevented Mr. Riofta from getting a fair trial. Assuming everything that has been alleged is true, it is not the function of this process to cure trial errors, but rather it is intended to use recent technological developments to prove in appropriate cases someone's innocence. Because of the above, I will take no further action in this matter.

If either of you have any questions in this matter, please advise.

Sincerely,

John Scott Blonien
Sr. Assistant Attorney General
Chief, Criminal Justice Division

JSB:mlg

WASHINGTON STATE COURT OF APPEALS

In re the Personal Restraint Petition

Of

Alexander Nam Riofta

No.
DECLARATION OF

E. ALLEN WALKER

I, E. Allen Walker, declare:

1. I was the counsel appointed to represent Alexander Nam Riofa on a charge of assault in the first degree while armed with a deadly weapon in Pierce County cause # 00-1-00511-5. I was assigned to the case on August 23, 2000.
2. I have experience as a trial attorney and an appellate attorney.
3. My declaration is based upon my memory of the case. I did not review the files in connection with the case.
4. I believe I would have sought DNA testing of the hat found at the scene had I received the letter (attached), fingering a specific different person in this case from the attorney for one of the Trang Dai defendants prior to trial. The letter wasn't provided until after the trial was concluded. I believe this was because the Trang Dai matter was still pending at the time this case was prosecuted. Given this new evidence, I feel the hat should be DNA tested. This would likely result either in greater evidence against Mr. Riofta, or give evidence that could exonerate him. I don't understand the harm in allowing further forensic examination, given the new evidence.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 22nd day of March 2005, in Tacoma, Washington.

E. ALLEN WALKER

Appendix 7

WASHINGTON STATE COURT OF APPEALS

In re the Personal Restraint Petition Of Alexander Nam Riofta	No. DECLARATION OF SETH WOOLSON AND DEREK JOHNSON

We, Seth Woolson and Derek Johnson, declare:

1. We currently represent Alexander Nam Riofa under the supervision of attorney Jacqueline McMurtrie, Innocence Project Northwest Clinic.
2. Our declaration is based upon our conversations with attorney Rita Griffith. Ms. Griffith was Jimmy Chea's appellate counsel in the Trang Dai massacre case. She said that she was aware of attorney Kristi Minchau's letter sent to the prosecutor in July 2002 that indicates "who actually committed the shooting for which Alexander Riofta [was] convicted and why the victim lied about the shooter's identity." (App. 6(g) (Letter from Minchau to Blonien of July 29, 2002)).
3. On November 19, 2004, we spoke with Ms. Griffith in an effort to obtain the identity of the person "who actually committed the shooting" as explained in Ms. Minchau's letter. Ms. Griffith informed us that she spoke with Mr. Chea regarding the shooter's identity, but that he had nothing further to say with regard to Mr. Riofta's case.

We declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 11 day of April 2005, in Seattle, Washington.

Seth A. Woolson

Derek M. Johnson

Appendix 8

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

In Re the Personal Restraint of Alexander Nam Riofta, Alexander N. Riofta, Petitioner.	)	No. _____ **DECLARATION OF MARK W. PROTHERO**

CERTIFICATION

I, Mark W. Prothero, hereby certify:

1. I am a criminal defense attorney in private practice. For over twenty years, I have been a criminal defense attorney in Washington. I was a public defender with the Associated Counsel for the Accused in King County, Washington beginning in 1983. Since 1990, one of my areas of expertise has been forensic DNA evidence. My experience with forensic DNA evidence includes:

   - In 1990, I attended a two-day seminar on forensic DNA evidence in Washington D.C. taught by Barry Scheck and Peter Neufeld.
   - In 1992, I represented Steven Hollis in a first degree rape case in which the trial court suppressed the DNA evidence at the conclusion of a 4 week *Frye* hearing. The *Hollis* case involved the RFLP methodology of forensic DNA analysis.

- In 1995, I represented Ken Ford in a case involving three counts of aggravated murder. This case involved extensive pretrial discovery and litigation concerning forensic DNA evidence. In *Ford*, the forensic DNA analysis methodologies utilized were PCR DQ alpha, polymarker, and D1S80.
- In 2000, I was appointed to represent Roy Webbe on a charge of aggravated murder. This case involved the forensic DNA methodology commonly referred to as "STR" (short tandem repeats). STR has been in common usage since 1997.
- In 2001, I was appointed to represent Gary L. Ridgway, originally charged with 4 counts of aggravated murder. The case involved forensic DNA evidence obtained from evidence nearly 20 years old. Every type of forensic DNA technology, RFLP, DQA, Polymarker, D1S80, STR, and mitochondrial DNA, was utilized at one point or another in the investigation.
- Over the past fifteen years, I have been consulted on several other cases involving forensic DNA evidence. I have also given approximately eight CLE presentations on forensic DNA evidence.
- I have utilized a number of experts over the years, including Randall Libby, Aimee Bakken, Donald Riley, Elizabeth Thompson, Sandy Zabell, Laurence Mueller, Elizabeth Johnson, and Marc Taylor. I am very familiar with the investigations associated with forensic DNA analysis.
- Since 1992, I have also retained various forensic laboratories to conduct DNA analysis of evidence in these cases. I have retained Genetic Design, a North Carolina laboratory, Intermountain Forensics Laboratory in Portland, Oregon,

Forensic Analytical, a forensic laboratory in Hayward, California, and Technical Associates Incorporated from Ventura, California.

- I am familiar with the utilization of these labs by various defense counsel in the preparation and investigation of cases, particularly rape and homicide cases. Since at least 1992, in Washington and across the country, defense counsel have utilized forensic DNA testing in their pre-trial preparation and investigation.

2. Mr. Riofta's legal counsel asked me to render my opinion regarding the performance of trial counsel in this case. I agreed to review materials and offer an opinion. I have reviewed the police report in Mr. Riofta's case and discussed the case with his current legal representatives.

3. From my review of the materials in Mr. Riofta's case, it is clear that the primary issue in this case concerned the reliability of the eyewitness identification. Mr. Riofta also presented an alibi defense at trial. In a case involving a misidentification defense, it is even more incumbent upon defense counsel to search for evidence that could raise doubt on the identity issue. Competent counsel should know of the potential uses of forensic DNA evidence, particularly counsel handling a serious felony (assault in the first degree with a firearm enhancement), with an identification defense.

4. I believe that reasonably competent counsel would have examined any item of evidence or clothing at the crime scene for potential biological evidence capable of forensic DNA analysis, particularly any surfaces where someone could have left bodily fluids or shed skin. It is my opinion that by failing to seek forensic DNA testing in Mr.

Riofta's case, the performance of trial counsel fell below an objective standard of reasonableness.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

4/11/05
Date

Kent, WA
Place

Mark W. Prothero WSBA #12400
Attorney at Law